

CIVIL DISTRICT COURT  
PARISH OF ORLEANS  
STATE OF LOUISIANA

GLORIA SCOTT AND \*  
DEANIA JACKSON \*  
\* NO. 96-8461  
VERSUS \* DIVISION "I"  
\* SECTION 14  
THE AMERICAN TOBACCO \*  
COMPANY, INC., ET AL. \*  
\*  
\* \* \* \* \*

Transcript of proceedings before The  
Honorable Richard J. Ganucheau, Judge Pro Tempore,  
Civil District Court, Parish of Orleans, State of  
Louisiana, 421 Loyola Avenue, New Orleans, Louisiana  
70112, commencing on June 18, 2001.

\* \* \* \* \*  
Tuesday Afternoon Session  
February 25, 2003  
1:32 p.m.  
\* \* \* \* \*

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1 I N D E X

2

WITNESS: PAGE

3

WILLIAM A. FARONE, Ph.D.

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DIRECT EXAMINATION BY MR. STEPHEN HERMAN..14876

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1 P R O C E E D I N G S

2

THE BAILIFF:

3

All rise for the jurors, please.

4

(Whereupon the jury joins the  
proceedings at this time.)

5

THE LAW CLERK:

6

Recess is over. Court will come to  
order.

7

8

THE COURT:

9

Please be seated.

10

Mr. Herman, are you ready to continue?

11

MR. STEPHEN HERMAN:

12

Yes, Your Honor.

13

THE COURT:

14

15 Proceed.  
16 MR. STEPHEN HERMAN:  
17 Good afternoon, everyone.  
18 THE JURY:  
19 Good afternoon.  
20 DIRECT EXAMINATION  
21 BY MR. STEPHEN HERMAN:  
22 Q. Dr. Farone, in your experience, are you  
23 familiar with the term the "state-of-the-art"?  
24 A. Yes, I am.  
25 Q. Now, what does that mean?  
26 A. State-of-the-art in technology or science or  
27 engineering is that which you can accomplish or are  
28 able to do at any given time in history. It changes  
29 with time.  
30 In other words, as we learn more, the state-  
31 of-the-art progresses. But if you pick a time, and  
32 you can look at what is known, what can be  
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1 accomplished at that time.  
2 Q. If you don't dedicate the resources and you  
3 don't, for whatever reason, do testing, can a  
4 company or a group of companies affect the state-  
5 of-the-art?  
6 A. Yes.  
7 Q. Based on your knowledge and experience, did  
8 the cigarette companies make an intentional choice  
9 to prevent real progress in the state-of-the-art in  
10 making safer cigarette products?  
11 MR. LONG:  
12 Objection. Foundation. Speculation.  
13 THE COURT:  
14 Overruled. Answer the question, if  
15 you're able to.  
16 A. Based on my understanding and my opinion,  
17 yes, they did.  
18 EXAMINATION BY MR. STEPHEN HERMAN:  
19 Q. Have you ever heard the term "paralysis by  
20 analysis"?  
21 A. I have.  
22 Q. What does that mean?  
23 A. Well, it can be used in two ways: One is to  
24 stop progress by analyzing something repeatedly. So  
25 if you keep analyzing and analyzing, then you spend  
26 your time, money and effort analyzing it and you  
27 don't actually solve the problem.  
28 It could also be used as a means of  
29 chastising people to get them to work faster, work  
30 better, and spend less time doing analysis.  
31 Q. Is it your opinion that the defendants could  
32 have, from 1954 to 1996, developed tobacco products  
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1 that would have been significantly safer?  
2 A. Yes, it is.  
3 Q. And you understand the reason I'm using 1996  
4 is because the class of Louisiana smokers had to  
5 start by 1996?  
6 A. Yes.  
7 MR. STEPHEN HERMAN:

8 I'd like to pull up for the witness and  
9 The Court and counsel WF-16.  
10 EXAMINATION BY MR. STEPHEN HERMAN:  
11 Q. Just generally, Dr. Farone, what is the chart  
12 that's before you?  
13 A. It's a chart that I prepared to try and help  
14 explain options for making safer cigarettes.  
15 MR. STEPHEN HERMAN:  
16 Your Honor, may we publish?  
17 THE COURT:  
18 You may publish it.  
19 MR. STEPHEN HERMAN:  
20 Thank you.  
21 EXAMINATION BY MR. STEPHEN HERMAN:  
22 Q. Now, this has a lot of information on it. So  
23 let's get a little bit of clarification.  
24 First of all, you used the word "likely" and  
25 you used the word "potentially." Is that because,  
26 as defense counsel pointed out yesterday, there  
27 haven't actually been trial studies and epidemiology  
28 studies to confirm whether these products would be  
29 safer?  
30 A. Well, that's one reason. There's other  
31 reasons, also.  
32 Q. What are some of those other reasons?

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1 A. Well, you have to, in order to call something  
2 safe, we have to agree on what we mean by that. And  
3 in certain areas of chemistry, we've picked numbers.  
4 For example, we're not going to have a product which  
5 increases the risk of cancer or we're not going to  
6 have a facility plant next to people's homes that  
7 increases the risk by more than one in one hundred  
8 thousand per year.  
9 And so the term "safe," there's nothing  
10 that's absolutely safe. You have to define what you  
11 mean by "safe." And so when I use the term "safe"  
12 here, I don't mean absolutely safe. I mean some  
13 acceptable level to society of risk, for example,  
14 that's used by various governmental agencies in  
15 determining whether they're going to let certain  
16 things happen or not.  
17 Q. And your opinions in this context on what  
18 would likely be a safe or dramatically safer  
19 cigarette, is that based on the knowledge and  
20 experience that you've acquired from Philip Morris  
21 and elsewhere and from what the companies actually  
22 developed and the tests that they actually  
23 performed?  
24 A. Yes, it is.  
25 Q. Now, when you say "safe," is that safe for  
26 all diseases?  
27 A. No, potentially safe for each -- Each kind of  
28 chemical interaction with tissues, with cells,  
29 results in a potentially different problem. And for  
30 smoking, we have cancer, we have pulmonary disease  
31 of various types like emphysema, and we have  
32 cardiovascular or heart disease.

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1 And so you have to also, when you're talking  
2 about safe, in addition to assigning a risk, you  
3 have to look at what potential diseases are we  
4 talking about when we talk about these various  
5 products.

6 Q. Okay. And if we take the first one, "Zero  
7 Tar Delivery Cigarette, Nicotine Added to Filter,"  
8 what would that be or likely be potentially safe  
9 for?

10 A. Okay. The idea with that first one here,  
11 "Zero Tar Delivery Cigarette," the technology for  
12 that was available. And if the carcinogenic  
13 materials for cancer, let's say, let's take that  
14 as an example, we're trying to remove all of the  
15 cancer-causing materials from the smoke, so we  
16 reduce the tar down to as close to zero as we can  
17 get it but we still allow the smoker to have  
18 nicotine.

19 Now, nicotine can, in fact, be a factor in  
20 cardiovascular disease. So we're not solving that  
21 part of the problem. But we are eliminating the  
22 carcinogens, the cancer-causing materials, so we are  
23 reducing the risk dramatically. If there's no  
24 carcinogens, no tar gets to the lungs, then it can't  
25 cause the problem.

26 If a tiny bit get there, then we have to  
27 assess whether that exposure by testing is  
28 sufficient to cause any problems or, in my  
29 definition of "safe," you couldn't tell a difference  
30 in the amount of cancer that people got using that  
31 versus people who didn't use the product at all.

32 Q. In your opinion, that was feasible to make a  
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1 cigarette like that in the 1960s?

2 A. In the 1960s? Yes. And that's when the  
3 filter technology first came into being.

4 Q. Okay. Have you brought a diagram that would  
5 be helpful to the jury in understanding what might  
6 be a potentially safe cigarette in this regard?

7 A. In that regard, I have, yes.

8 MR. STEPHEN HERMAN:  
9 Okay. Could we pull up, please, WF-17?  
10 May we publish?  
11 THE COURT:  
12 You may publish it.

13 EXAMINATION BY MR. STEPHEN HERMAN:  
14 Q. Could you explain, using this diagram to the  
15 jury, exactly what you're talking about?

16 A. This is an ultimate one. You don't have to  
17 go to this extreme. But in the extreme, if you had  
18 a barrier here, you could have tobacco in a rod and  
19 you could light this, it would burn, it turns to  
20 coal, you would see smoke coming off of it.

21 But what the smoker gets would be drawn  
22 through this filter where the arrows are shown for  
23 the air coming through. And you can have nicotine,  
24 flavor, other things that you would like to deliver.  
25 Each one of those things and the combination would  
26 have been tested for its safety, so that you could  
27 show that there's no cancer-causing materials in  
28 there.

29 And, in practice, there actually were  
30 products on the market, even without this barrier,  
31 where the amount of tar that you would get is very  
32 small. But this would ensure that virtually no tar  
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1 was delivered to the smoker, only the nicotine and  
2 flavors.  
3 Q. Thank you.  
4 Can we go back to the previous demonstrative,  
5 WF-16?  
6 Now, before we get to "Alternative Nicotine  
7 Delivery," let me ask you a question. Do you have a  
8 working definition of what a cigarette is?  
9 A. Yes, I do.  
10 Q. And where does that definition come from?  
11 A. Well, there are two sources: One is the  
12 Bureau of Alcohol, Tobacco & Firearms, which  
13 regulates tobacco, has a definition; and there's  
14 also various definitions that have been used by the  
15 industry over the years.  
16 Q. Okay. And what is your working definition of  
17 "cigarette"?  
18 A. It's tobacco wrapped in paper.  
19 Q. And where does that come from specifically?  
20 A. Well, that's the Bureau of Alcohol, Tobacco &  
21 Firearms definition.  
22 Q. Is there another way to think about the  
23 product that Philip Morris and the other companies  
24 are selling?  
25 A. Yes, there is.  
26 Q. Okay. The jury has seen a document written  
27 by someone named William Dunn at a conference in the  
28 Caribbean. Are you familiar with that document?  
29 A. I am.  
30 Q. How are you familiar with it?  
31 A. Well, Dr. Dunn was at Philip Morris at the  
32 time I was there. I talked with him extensively;  
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1 worked with him; we had programs for the study of  
2 nicotine, some of which I was personally involved  
3 in; and he wrote that document, he presented it; he  
4 also authored a book on the subject.  
5 MR. STEPHEN HERMAN:  
6 Okay. I'd like to show the witness and  
7 counsel and The Court WF-18, please.  
8 EXAMINATION BY MR. STEPHEN HERMAN:  
9 Q. Do you recognize that, Dr. Farone?  
10 A. (Witness reviews document.) Yes, I do.  
11 MR. STEPHEN HERMAN:  
12 Can we publish, Your Honor?  
13 THE COURT:  
14 You may publish it.  
15 MR. STEPHEN HERMAN:  
16 Thank you.  
17 EXAMINATION BY MR. STEPHEN HERMAN:  
18 Q. The jury has seen other parts of this  
19 document. It says, "The cigarette should be  
20 conceived not as a product but as a package. The  
21 product is nicotine."



22 Do you generally agree with that?  
23 A. Yes. The purpose of the cigarette is to  
24 deliver nicotine.  
25 Q. Was that generally accepted within Philip  
26 Morris when you got there in 1976?  
27 A. Yes.  
28 Q. Let's talk about Dr. Dunn for a second.  
29 Do you know how long he had been employed by  
30 Philip Morris by 1976?  
31 A. I know -- Not exactly. I know he came in the  
32 sixties. He was there in the early sixties, I  
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1 believe.  
2 Q. And where was his office located in the  
3 Research & Development hierarchy?  
4 A. It was on the same floor as mine and the  
5 other directors, next to the Vice-President of  
6 R & D.  
7 Q. Now, you mentioned a book. And it was  
8 suggested by the defendants that this paper was  
9 published, and I think they gave the book to Dr.  
10 Cummings when he was on the stand.  
11 Are you familiar with this book?  
12 A. Yeah, I've seen it and I've read it.  
13 Q. Did Dr. Dunn publicly disclose in his book  
14 this statement that's up here?  
15 A. I don't recall this statement in the book.  
16 It was in the paper that he gave at the conference  
17 prior to the book being published.

18 MR. STEPHEN HERMAN:  
19 Okay. Can we go back to WF-16, please?  
20 THE COURT:  
21 You may publish it.  
22 MR. STEPHEN HERMAN:  
23 Thank you.

24 EXAMINATION BY MR. STEPHEN HERMAN:  
25 Q. Now, it says "Alternative Nicotine Delivery."  
26 And then what does it say underneath there?  
27 A. Well, those are different forms of things  
28 which we know can be used to deliver nicotine. The  
29 first one is aerosol. That means you can mix  
30 nicotine with water and maybe a little bit of  
31 glycerin, some flavors, and you can put it in like  
32 an aerosol sprayer. So that you could inhale those  
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1 particles and it would perform the same function in  
2 cigarette smoke except it wouldn't have the  
3 cancer-causing mutagens in it, the cancer-causing  
4 chemicals.  
5 As we know, it can be put into candy, it can  
6 be put into gum. There's many ways -- It can be put  
7 in soft drinks. There's many ways at very low  
8 levels. Because nicotine is a poison, in and of  
9 itself, so you have to make sure that the level  
10 that's being applied is very, very low and it's  
11 consistent with the amount that someone gets from a  
12 cigarette.  
13 But you can put nicotine into a wide variety  
14 of products that would essentially provide the same

15 level; and, in the case of the aerosol, in exactly  
16 the same form because you could actually inhale  
17 that.  
18 Q. And, in your opinion, when would it have been  
19 feasible to make an alternative nicotine delivery  
20 product like that?  
21 A. Well, I have here the late 1950s. The  
22 suggestions and actual types of things were tested  
23 in the early '40s, like drinks or fluids that  
24 contain the nicotine. But by the 1950s, that  
25 technology to make an alternative product that would  
26 take the place of a cigarette, these aren't by the  
27 BATF definition cigarettes but they perform the same  
28 function.  
29 Q. Okay. The next thing you have is  
30 "Noncombustible Devices (tobacco-heated, not  
31 burned)." And before you explain that, let's make  
32 it clear that we have Premier, Accord and Eclipse.  
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1 Is it your opinion that those actual products  
2 are safe?  
3 A. No. That wasn't the point of putting them  
4 there. The point of putting them there was to  
5 demonstrate that some of the technology we're  
6 talking about here is actually being implemented in  
7 -- now or has been since the late eighties.  
8 The technology itself goes back to the 1960s  
9 when a device which had a tube inserted in the  
10 center of a cigarette and then blocked off the rest  
11 of the cigarette. So whatever you put in the tube,  
12 when you lit the cigarette, the burning tobacco will  
13 heat the tube, the tube would give off the nicotine.  
14 So none of the actual smoke from the tobacco got to  
15 the smoker, only what was inside the tube.  
16 All of these devices are called indirectly  
17 heated cigarette devices. This would still be a  
18 cigarette. It's got tobacco, it's got paper, but  
19 you're not really inhaling or taking into your lungs  
20 the smoke from the tobacco. It's only what's in the  
21 tube.

22 These three products that you see here don't  
23 actually burn the tobacco; they heat it up. And  
24 actually they should probably be in the second  
25 category. Because of that, there's dramatically  
26 reduced amounts of certain chemicals but not for  
27 the levels for the individual chemicals that are  
28 considered safe by the definition I gave you before.  
29 And I think it's important to understand that  
30 there is no standard for safety in cigarettes;  
31 there's only standards for safety in the individual  
32 chemicals that we talked about before. So there's a  
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1 standard for acetaldehyde, there's a standard for  
2 formaldehyde, different chemicals, but not for the  
3 combination that we call cigarette smoke.  
4 Q. And you started to touch on "Dramatically  
5 Safer Cigarettes." Can you explain that term a  
6 little bit more?  
7 A. The second category, "Dramatically Safer

8 Cigarettes," go along with the idea, well, if we  
9 couldn't or didn't want to or, for whatever reason,  
10 didn't want to go all the way and meet some very,  
11 very low standard, how could we have dramatically  
12 changed so that the disease causation would be  
13 dramatically lower? And by "dramatically," I mean  
14 we reduce it by 50 percent or more.

15 So this goes back to the idea that for all of  
16 these chemicals that's a mixture, there's a dose-  
17 response. And the less you have, if you get it down  
18 below a certain level and you test it, you can find  
19 out that the potential risk from that product is  
20 reduced. So here we're not trying to go all the  
21 way; we're just trying to go halfway, three-quarters  
22 of the way to make it a lot better than the products  
23 that are being sold.

24 Q. Okay. And the first thing that you have  
25 listed is "Cigarettes Without Nicotine." And to be  
26 fair, you've testified in the past that you don't  
27 believe this is necessarily the best way to make a  
28 safer cigarette because if someone's already  
29 addicted, they likely won't smoke it; is that right?

30 A. That's correct.

31 I put it on this chart because some people in  
32 the public health community feel this is a good

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1 thing to do because people won't smoke it; and,  
2 therefore, you solve the problem and prove to people  
3 that the only reason why they're smoking is for the  
4 nicotine. Once people understand that completely,  
5 then -- that this cigarette isn't going to do that  
6 for them, then they don't smoke it and then they're  
7 not exposed to the bad things that are in the smoke.

8 Q. If, hypothetically, I'm not addicted yet and  
9 I'm a 14-year-old teenager who wants to look cool,  
10 is it going to be dramatically safer for me to start  
11 smoking a cigarette without nicotine than I'm not  
12 going to get addicted to than, say, a Marlboro?

13 A. Yes.

14 Q. And is it also true that a cigarette without  
15 nicotine is safer because when you remove the  
16 nicotine, it lessens the creation of tobacco-  
17 specific nitrosamines?

18 A. That's also true. The tobacco-specific  
19 nitrosamines, which I listed on that chart of bad  
20 things that are in smoke, on the top of the chart,  
21 those are tied to the nicotinic alkaloids, as we --  
22 nicotine-like substances. If we take out the  
23 nicotine, then no more of those can form. And  
24 usually when you take out nicotine, the ones that  
25 have already formed come out with it. So that you  
26 really dramatically reduce those chemicals.

27 Q. And how long has it been feasible to take the  
28 nicotine out of tobacco?

29 A. By taking the nicotine out, I'd say in the  
30 1800s. That's based on the fact that there are  
31 varieties of tobacco that you could grow that don't  
32 have nicotine in it. In the 1950s, actually

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1 commercial products were sold with 97 percent of the  
2 nicotine removed. And, again, in around 1990.

3 So if you're just talking about removing it  
4 from tobacco, certainly by the '50s one could do it.  
5 If you're talking about using tobacco which you  
6 selected because genetically it doesn't have any  
7 nicotine in it, you could have done it a hundred  
8 fifty years ago.

9 Q. And the next thing is "Treatment of Tobacco"  
10 with -- I can't really read it, but I think it's  
11 microorganisms, metals, extracting.

12 A. Correct.

13 You can extract things out of the tobacco.  
14 You can treat tobacco in different ways to reduce  
15 the potential chemicals that we talked about on that  
16 list of bad chemicals so that they're cut by 50  
17 percent or they're cut by 90 percent. What we're  
18 trying to do is to make a dramatic reduction.

19 And then what we would do, since we know we  
20 can make that reduction, we would take that product  
21 and test it in laboratory tests and then in animal  
22 tests and, finally, put it in the market for people.

23 Q. Well, it sounds kind of strange to me that  
24 you're going to add a metal to a cigarette and make  
25 it safer?

26 A. Well, this is a particular kind of metal.  
27 What we're talking here about is precious metals,  
28 not the ones we were talking about that cause  
29 toxicity. But the purpose of these metals is to  
30 improve the combustion process.

31 I mentioned earlier today that the -- if you  
32 burn something completely and combustion was a  
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1 hundred percent, you'd only make carbon dioxide and  
2 water. It won't hurt you. Well, you can suffer  
3 from carbon dioxide; but the amounts we're making,  
4 it's not going to hurt you. And so, therefore, it  
5 would be much safer because you wouldn't be making  
6 as many bad chemicals. That is a way of looking at  
7 it.

8 Q. And there's a way to make tobacco safer or a  
9 cigarette safer if you add bacteria or  
10 microorganisms?

11 A. Microorganisms can be used to remove certain  
12 chemicals, like nitrates. Nitrates, when they are  
13 burned, form oxides of nitrogen, which are bad  
14 things in the air. Those oxides of nitrogen react  
15 with nicotine, react with more nicotine to make the  
16 tobacco-specific nitrosamines. So it's a long chain  
17 of events. But by treating the tobacco to remove  
18 the bad chemicals that form into something else, you  
19 can dramatically reduce those chemicals.

20 Q. And when were those types of methods  
21 feasible, in your opinion?

22 A. There's a lot of publications from the 1970s,  
23 patents, various kinds of things that show that this  
24 technology works.

25 Q. The next thing you have is "Genetic  
26 Modification of Tobacco."

27 A. Yes. Genetically, you can modify tobacco.  
28 There are a lot of scientific publications that tell

29 you that the amount of some of the bad -- some of  
30 the worse chemicals, like the nitrosamines, or some  
31 of the chemicals that cause mutations are due to  
32 chemicals that have nitrogen in them, okay?

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1 And the nature in tobacco, the nitrogen-  
2 containing chemicals are the proteins. All plants  
3 have a certain amount of protein in it. And they  
4 are the things that -- proteins that contain  
5 nitrogen. So if you reduce the amount of protein in  
6 a tobacco, in the variety that you pick, you will  
7 reduce its potential to form mutagens.

8 And this was demonstrated many different ways  
9 by the time I had got to Philip Morris. And Philip  
10 Morris actually had a program to do that, to attempt  
11 to do that.

12 And so the removal of nitrogen from the  
13 tobacco or growing plants that don't have as much  
14 protein in it, they have more cellulose, would, in  
15 fact, reduce the toxicity dramatically.

16 Q. And then, finally, we have "Noninhalable" and  
17 then it says "modern cigarette." What does that  
18 mean?

19 A. Well, that's the last one down here  
20 (indicating), "Noninhalable." Obviously, if you  
21 don't inhale, the chances of getting lung cancer or  
22 pulmonary disease in your lungs are going to be  
23 dramatically less. And we all know that there's  
24 certain tobacco products that are not often inhaled,  
25 like a cigar, a pipe.

26 The idea here is to take a cigarette, that  
27 is, tobacco wrapped in paper, and return it to a  
28 form that many cigarettes were in in the early 1900s  
29 or late 1800s where the tobacco is such that when  
30 you try to inhale it, it's going to cause you a real  
31 great problem. You don't make it easy to inhale.

32 You actually make it difficult to inhale by  
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1 increasing the basicity.

2 Maybe you've heard about pH increase. But  
3 you increase the pH, you can increase the particle  
4 size, so that it's very hard to get it in your  
5 lungs. And if you don't get it in your lungs, you  
6 may still have potential for disease, oral cancer,  
7 tongue cancer, things like that, but we've  
8 dramatically reduced the impact on the lungs.

9 Q. And, in your opinion, when was it feasible to  
10 have made a modern, noninhalable cigarette?

11 A. By "modern" here, I mean using the machines  
12 and the things we're doing now. So I put the 1950s  
13 because by that time all of the technology that was  
14 needed to really increase the pH of the smoke to  
15 make it so that you couldn't inhale it and get it  
16 way up there could be available.

17 Q. Okay. Now, we know what the industry knew.

18 MR. STEPHEN HERMAN:

19 If we could go to WF-19 just for The  
20 Court.

21 Can we publish?

22 THE COURT:  
23 Yes, you may publish it.  
24 EXAMINATION BY MR. STEPHEN HERMAN:  
25 Q. We'll see what the defendants did.  
26 The first one, "Zero Tar Delivery Cigarette,  
27 Nicotine Added to Filter," and you have developed  
28 1980 without adding the nicotine. Could you explain  
29 what you mean by that?  
30 A. Well, around that time, there were several  
31 products that came on the market. One Philip Morris  
32 put out was called Cambridge that actually had very  
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1 close to zero tar. And so that technology at least  
2 was available by that time.  
3 There were other products from other  
4 manufacturers who were about the same. That one was  
5 advertised as being the lowest. But, in fact, since  
6 then, various manufacturers have been able to make  
7 that, essentially, that same product.  
8 So with this product, there is virtually, by  
9 the Federal Trade Commission test, virtually no tar  
10 coming out the back end of the cigarette. But in  
11 order to make that acceptable to a smoker who is  
12 used to getting nicotine, we have to add nicotine.  
13 So they made the product but they didn't add the  
14 nicotine.  
15 Q. And did they ever test market a product with  
16 the nicotine added?  
17 A. Not to my knowledge.  
18 Q. And then so they never placed it on the open  
19 market, either?  
20 A. That is correct.  
21 Q. Could you just explain based on your  
22 experience at Lever Brothers, Philip Morris and  
23 Applied Power Concepts, what is a test market?  
24 A. A test market is where you take a small  
25 segment of the total market that you're going to try  
26 and sell to; and you put your product in that small  
27 segment, usually for things which you expect to sell  
28 across the entire country. You pick one or two  
29 cities or three cities. You try to pick them so  
30 that they have populations that are very diverse,  
31 representative of your entire market. And that way  
32 you only have to try a small amount of that product  
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1 in those markets.  
2 Q. And for the purposes of this graph, what's  
3 the distinction between "Test Marketed by  
4 Defendants" and "Placed on Market by Defendants"?  
5 A. Well, my distinction here is whether you try  
6 it and then you say, well, I'm not going to sell it  
7 nationally in all 50 states or maybe you might not  
8 even try it at all. So trying it is putting it in  
9 the test market or at least that's what test  
10 marketing means. And then "Placed on Market" is  
11 national distribution.  
12 Q. Okay. If we go to "Alternative Nicotine  
13 Delivery," when were some of those devices actually  
14 developed by the cigarette company?

15 A. By the cigarette companies, I mean, well,  
16 they were never actually -- they were maybe  
17 internally developed in R & D, but they were never  
18 actually put into test market or market that I'm  
19 aware of.  
20 Q. Now, we go to "Noncombustible Devices." And  
21 there's a few references there to things being test  
22 marketed. Can you explain a little bit about that?  
23 A. Well, those three, the Premier, the Accord  
24 and the Eclipse, I just wanted to be assured again  
25 that we're not talking about it being safe but the  
26 technology could be used to dramatically reduce  
27 things further. And I wanted to give the industry  
28 credit for having tried to at least get that far.  
29 And those devices were, in one case, you can  
30 see there they were test marketed. And as far as I  
31 know, they were never introduced nationally in all  
32 50 states but to different degrees, different kinds  
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1 of test markets.  
2 Q. To be fair, is there one that you're not  
3 absolutely sure about, though?  
4 A. Well, I'm not sure about Premier. I don't  
5 know whether that was actually introduced  
6 nationally, but I don't think it made it in all the  
7 states.  
8 Q. Around when was Premier test marketed?  
9 A. Late 1980s.  
10 Q. And around when were Accord and Eclipse test  
11 marketed?  
12 A. The late 1990s or mid 1990s in the case of  
13 Eclipse. Accord was about '98 or '99, the late  
14 nineties.  
15 Q. Okay. Then if we go to "Cigarettes Without  
16 Nicotine," we have kind of a bifurcated test  
17 marketing process. Can you explain that?  
18 A. In 1950s, there was a product put on the  
19 market called Sano, S-A-N-O, and two different  
20 versions. It was a very low nicotine.  
21 And when we say no nicotine, it depends on  
22 how well you can extract it. So it's like  
23 decaffeinated coffee, it's 97 percent taken out or  
24 98, some large number like that. It still has some  
25 nicotine left. Those products were sold in the  
26 1950s. And then Philip Morris sold a similar  
27 product in the early 1990s.  
28 Q. Is that Next?  
29 A. That is correct.  
30 Q. Okay. And was Next ever actually placed on  
31 the market?  
32 A. I don't believe so. I believe that it was  
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1 test marketed and then it was not introduced  
2 nationally.  
3 Q. Okay. Now, we talked a little bit about test  
4 markets before. Can you just give the jurors an  
5 idea about your experience in either participating  
6 in or supervising test markets over the course of  
7 your experience through all the companies you've

8 worked for?  
9 A. Well, yes. I mean, at Lever Brothers, for  
10 example, we helped analyze the data from the test  
11 markets that were tried. We set them up. In my  
12 later period at Philip Morris, a facility called the  
13 subjective evaluation facility or the consumer test  
14 area reported to me. And in that period, we did --  
15 we were involved in looking at test marketing of  
16 Philip Morris products.

17 Q. Okay. And Mr. Bible and Mr. Tamol have both  
18 testified that Next was a failure in the market?

19 MR. GAY:

20 Objection. Objection.

21 THE COURT:

22 Approach the bench.

23 (Whereupon a bench conference was held  
24 at this time as follows:)

25 THE COURT:

26 Had you finished your question?

27 MR. STEPHEN HERMAN:

28 No, but I was just going to say --

29 THE COURT:

30 "Mr. Bible and Mr. Tamol have both  
31 testified that Next was a failure in the  
32 market," that's as far as you got.

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1 MR. GAY:

2 But the problem is that's the  
3 objectionable part of the question. I was  
4 trying to avoid that. He's asking him to  
5 comment on the testimony of another witness.

6 THE COURT:

7 Well, I don't know what he's going to  
8 ask him, which is why I asked him if he had  
9 finished his question.

10 What was your question going to be?

11 MR. STEPHEN HERMAN:

12 I was going to ask him -- And I think  
13 he's testified to that as well. And I'm  
14 going to point out that that's just a test  
15 market, not an actual failure on the  
16 marketplace.

17 THE COURT:

18 Well, why don't you ask him the  
19 question. I'm not going to allow him to  
20 comment on other testimony.

21 MR. STEPHEN HERMAN:

22 Okay.

23 THE COURT:

24 But you can ask him the substance of the  
25 testimony in the form of a direct question,  
26 okay?

27 MR. STEPHEN HERMAN:

28 Sure.

29 THE COURT:

30 I'm going to sustain the objection to  
31 the form of the question.

32 MR. GAY:

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1 Thank you, Your Honor.  
2 (Whereupon the bench conference is  
3 concluded at this time.)  
4 THE COURT:  
5 The objection to the form of the  
6 question is sustained.  
7 Don't answer that question.  
8 Next question, please.  
9 EXAMINATION BY MR. STEPHEN HERMAN:  
10 Q. Dr. Farone, is it your understanding that  
11 Next was a failure in the marketplace?  
12 A. That's what I understand from Philip Morris  
13 documents.  
14 Q. Are there any, based on the background you  
15 just gave with respect to test markets, are there  
16 any rules in the test market about what is a failure  
17 or what is a success?  
18 A. There usually are rules set up by the company  
19 ahead of time. They have to do with economic  
20 objectives. For example, you can do it in terms of  
21 dollars; I'd like to get X million dollars from  
22 selling this product. And a test market tells you  
23 what percent of the market you get. And then if you  
24 multiply that times the national market for that  
25 product, you can get an idea of whether or not you  
26 can achieve your economic objective.  
27 To use an example, at Lever Brothers, we  
28 liked the revenue from a new product to be something  
29 in the area of five to ten million dollars for each  
30 product that we sold if it was going to be a new  
31 product. So if we had a new detergent and it got  
32 one percent of the market in a city, and then you  
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1 multiplied that by the number of cities where you  
2 were going to sell it, you could see whether you  
3 could raise -- whether it would sell to that amount  
4 of money. So that's one way to do it.  
5 The other way to do it is a little more  
6 difficult is to say you're going to get a certain  
7 percentage of the market; in other words, I want to  
8 get ten percent of the market or I'm going to get  
9 five percent of the market. So those are two  
10 different kinds of objectives that you could set for  
11 your product.  
12 Q. But, hypothetically, you could have a test  
13 market, get a 50 percent market share, and for  
14 whatever reason decide not to market it and call  
15 that a failure?  
16 MR. GAY:  
17 Objection, Your Honor.  
18 THE COURT:  
19 Do you wish to approach, Mr. Gay?  
20 MR. GAY:  
21 Sure.  
22 THE COURT:  
23 It's not mandatory. If you've got a  
24 one-word description.  
25 MR. GAY:  
26 Yes, he's not qualified. It's outside  
27 of his qualifications.  
28 THE COURT:

29 Overruled. Answer the question if  
30 you're able to.  
31 A. Yes.  
32 EXAMINATION BY MR. STEPHEN HERMAN:  
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1 Q. And you could have a test marketing and get a  
2 two percent market share and decide to put that on  
3 the market and call it a success, if you wanted to?  
4 A. Yes.  
5 Q. Without giving me any dollar figures, just  
6 talking about market share, based on your knowledge  
7 and experience at Philip Morris, what market share  
8 would you have needed to have a cigarette be  
9 profitable?

10 MR. GAY:  
11 Objection, Your Honor. That's beyond  
12 his qualifications. He's not a market --  
13 Excuse me.  
14 THE COURT:  
15 Overruled. Answer the question if  
16 you're able to.  
17 A. Based on the information that I had, it was  
18 four-tenths of a percent.  
19 EXAMINATION BY MR. STEPHEN HERMAN:  
20 Q. So if you assume, hypothetically, that in  
21 test markets, Next had as little as four-tenths of a  
22 percent, that product could have been profitable and  
23 made money for Philip Morris?

24 MR. GAY:  
25 Objection. Speculation.  
26 THE COURT:  
27 Overruled. Answer it if you're able to.  
28 A. Yes, I think -- You said could have. It  
29 could have been. It depends exactly on the product.  
30 But the number that I had was basis studies that we  
31 did, yes.  
32 EXAMINATION BY MR. STEPHEN HERMAN:  
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1 Q. Now, the defendants have suggested that Next  
2 failed in the marketplace because of attacks by the  
3 public health community. When you were at Philip  
4 Morris, weren't Marlboros and Camels and Newports  
5 and Kools attacked by the public health community?  
6 A. Yes, they were.  
7 Q. And did you ever hear anyone at any of these  
8 Richmond meetings of Philip Morris suggest that  
9 because the public health community was attacking  
10 Marlboros, maybe we should take it off the market?  
11 A. No, I did not.  
12 Q. If we go back to the chart we have,  
13 "Alternative Nicotine Delivery," were any of those  
14 products either test marketed or placed on the  
15 market by defendants?  
16 A. No, not that I'm aware of by the defendants.  
17 I mean, other people, of course, have sold smoking  
18 cessation products that fall into those categories,  
19 but not by the defendants.  
20 Q. And in terms of the noncombustible devices,  
21 where the tobacco is heated, the defendants, as we

22 discussed, test marketed and, to your knowledge,  
23 never placed them in the open market?  
24 A. And by placing -- Well, the test market is an  
25 open market; but they never marketed them nationally  
26 across the United States, as far as I know.  
27 Q. Thank you.  
28 And cigarettes without nicotine, since the  
29 1950s, have they ever been placed on the market?  
30 A. Well, since the 1950s, no, just test market  
31 of Next is the only one I'm aware of.  
32 Q. And what about treatment of tobacco and those  
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1 things like NOD? I don't know if I asked you about  
2 NOD. What's NOD?  
3 A. NOD is one of those processes, of which  
4 there are several, called naturally occurring  
5 denitrification. It's just one way of many of  
6 removing nitrogen which causes these oxides of  
7 nitrogen that we were talking about before, so --  
8 Q. Were any of these products like NOD or  
9 palladium or any of these other treatment of tobacco  
10 products placed on the market by the defendants?  
11 A. Not to my knowledge.  
12 Q. To your knowledge, did any of the defendants  
13 place on the market anything with genetic  
14 modification of tobacco?  
15 A. Not in the sense that I refer to it here,  
16 that is, a genetic modification that was developed  
17 specifically to show a proven reduction in some form  
18 of testing, biological testing.  
19 Q. And what about the noninhalable modern  
20 cigarette?  
21 A. In terms of a cigarette, I don't know of any  
22 that have fallen into that category.  
23 Q. So, basically, these are six potential  
24 alternative feasible designs that have never been  
25 placed on the market?  
26 A. Or very limited market, yes.

27 MR. STEPHEN HERMAN:

28 Thank you. We can take that down.

29 EXAMINATION BY MR. STEPHEN HERMAN:

30 Q. Have you brought with you a list of other  
31 things that you can do to cigarettes to make them  
32 safer?

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1 A. A general list, yes.  
2 MR. STEPHEN HERMAN:  
3 Okay. Could we pull up WF-20, please?  
4 May we publish, Your Honor?  
5 THE COURT:  
6 You may publish it.  
7 EXAMINATION BY MR. STEPHEN HERMAN:  
8 Q. Is this the list or the first page of the  
9 list?  
10 A. (Witness reviews document.) Yes, it is.  
11 Q. And "Screen For and/or Wash Radioactive  
12 Material," what does that mean?  
13 A. Well, each of these things is here because  
14 there is some indication from literature results or

15 from testing that was done to show that that would  
16 reduce the risk. They're not here because --  
17 They're not on the previous list because we don't  
18 know as much about these other than the fact that  
19 they have the potential to reduce risk.  
20 Q. Okay. Let me stop you right there because I  
21 have a question related to that. If the defendants  
22 didn't do what you say they should have done, i.e.,  
23 whole product testing, how do you know that there  
24 are any techniques that would have made the product  
25 safer?  
26 A. Well, because we did do testing on prototype  
27 products; products that weren't sold commercially  
28 but, for example, different kinds of tobacco made up  
29 into a cigarette or different kinds of treatment of  
30 the reconstituted tobacco made up into a cigarette.  
31 So these concepts that I'm talking about here are  
32 based on those studies. So that they're not just  
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1 abstract ideas; they are based on actual studies but  
2 not with as-marketed cigarettes.

3 Q. Thank you.  
4 Now, can we go back and discuss the screening  
5 for and/or washing radioactive material?  
6 A. The radioactive material we're predominantly  
7 interested in is a metal called polonium 210. And  
8 it's a radioactive material that gets on the tobacco  
9 due to fertilizers being used in extensive amounts  
10 on growing tobacco. And it's contained in some of  
11 the fertilizers and it gets on the tobacco leaf and  
12 some of it actually gets inside the tobacco.

13 Research was done in the late '70s which  
14 showed that you could wash it off. If you washed  
15 the tobacco leaves, you could reduce 50 percent of  
16 it. Also, a special laboratory was built that  
17 showed that you could actually measure tobacco and  
18 make sure that the amount -- the ones that you were  
19 putting into cigarettes had very, very low levels,  
20 what we call background levels.

21 I mean, you can't always remove a hundred  
22 percent of these things. There's radioactivity  
23 background in this room. But we can make sure that  
24 what we're putting in is not above the background  
25 level.

26 Q. What was that lab called?  
27 A. It was called the low-level laboratory.  
28 Q. And in all the documents that you've reviewed  
29 since 1993 on the website in connection with the  
30 government and litigation, have you ever seen low-  
31 level lab test results?

32 A. I have not.  
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1 Q. Have you looked for them?  
2 A. Yes, I have. I found documents related to  
3 the building and operation of the laboratory but not  
4 the results.  
5 Q. Okay. Would I be correct that polonium 210  
6 would also get on food products?  
7 A. Yes, it would.

8 Q. What would be the difference between finding  
9 polonium 210 on a food product and finding polonium  
10 210 in tobacco or on tobacco?  
11 A. Well, there's two major differences: One is  
12 that in the case of vegetables or whatever, if  
13 they're washed, you wash it off; the second is that  
14 when you eat something and it goes through your  
15 gastrointestinal tract, you have a means of removing  
16 what's left over. It goes through your body.  
17 Whereas, if it becomes lodged in your lungs  
18 due to inhaling it, it's a much more difficult  
19 process to get that material out of your lungs.  
20 Essentially, you have to cough an awful lot to get  
21 it out.  
22 Q. Thank you.  
23 I'm not sure if we need to elaborate on all  
24 of these. But just so we get it into the record, if  
25 you could just read the other things that you can do  
26 to make a cigarette safer.  
27 A. Well, there are filters that have greater  
28 efficiencies for certain chemicals than ones being  
29 used. There is plenty of information on that. So  
30 we could use that on all the cigarette products.  
31 We talk a little bit about increasing  
32 ventilation to where I could remove all of the tar.  
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1 Well, let's remove 99 percent of it. Let's continue  
2 to remove the tar down to where there's very little  
3 in every product being sold.  
4 Ingredients, we're using -- there are  
5 ingredients being used in tobacco which, when  
6 burned, provide chemicals that are as bad, if not  
7 worse, than some of the chemicals that we're worried  
8 about here. So we shouldn't use ingredients that,  
9 when they are burned, cause the production of those  
10 chemicals even if, when you add it to tobacco, you  
11 don't see a difference.  
12 MR. STEPHEN HERMAN:  
13 Can we go to the next page, please?  
14 May we publish?  
15 THE COURT:  
16 You may publish it.  
17 EXAMINATION BY MR. STEPHEN HERMAN:  
18 Q. Can you go through these, please?  
19 A. Yes.  
20 This is an extension. Certainly, you  
21 wouldn't want to add anything that would reinforce  
22 or increase the addictive nature of the material.  
23 Actually, in the case of we talked about removing  
24 the nitrates, if you don't fertilize too much, you  
25 don't have as many to remove to start off with. So  
26 you could have a program where you tremendously  
27 reduce the amount of fertilizer used. That's a big  
28 educational problem with farmers, but that could be  
29 done.  
30 And then, of course, there's the issue of  
31 residual pesticides and those kinds of things. You  
32 could screen to make sure they weren't there. You  
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1 can change other features of the cigarette we talked  
2 about before.

3 And the last thing I have on this list, there  
4 are forms of other kinds of tobacco, some tobacco  
5 called Maryland; basically, air-cured tobaccos. And  
6 if you use air-cured, bright tobacco, you'll recall  
7 from this morning that's the one that's normally  
8 flue-cured, we heat it up with a flue, but if you  
9 just hang that in the air, that's still pretty good  
10 tobacco.

11 But we know from back in the sixties that the  
12 air-cured tobaccos, not burley, but air-cured  
13 tobaccos, like bright and Maryland tobacco, have  
14 much lower potential in these biological tests than  
15 the products that are being marketed.

16 MR. STEPHEN HERMAN:

17 Can we put up the last page, please?

18 EXAMINATION BY MR. STEPHEN HERMAN:

19 Q. Can you go over these?

20 A. It's more of the same.

21 Use tobacco with more cellulose, I mentioned  
22 that the protein was determined to be the major  
23 problem in a lot of the toxicity tests that were  
24 being run.

25 Q. What is cellulose as opposed to protein?

26 A. Well, cellulose is what gives structure. I  
27 mean, paper is cellulose. But the structure in  
28 tobacco leaf comes from the cellulose. The protein  
29 is what the plant uses to generate energy from  
30 light. But you don't need as much of that as plants  
31 have. They have about seven percent of the dry  
32 weight as being protein. But you can grow tobacco

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1 that has as little as one to two percent.

2 At Philip Morris we actually had a program  
3 to grind up the tobacco, take out the protein,  
4 reconstitute the whole blend. And there is  
5 technology developed for that.

6 Use more expanded tobacco, we talked about  
7 that. If you have a hundred percent expanded  
8 cigarette, it's better.

9 Cure the tobacco differently, we talked about  
10 the flue-curing and not being as good.

11 And, again, the last one, part of the  
12 inhalation technology is to cut the filler so that  
13 it's not as easy to have small particles that you  
14 can inhale.

15 MR. STEPHEN HERMAN:

16 Thank you. We can take that down.

17 EXAMINATION BY MR. STEPHEN HERMAN:

18 Q. When you were at Philip Morris, did the  
19 company in designing and making their cigarettes  
20 desire that smokers become dependent on nicotine?

21 A. Yes.

22 Q. That's a choice the company made?

23 A. Yes.

24 Q. And the company, in designing and making its  
25 cigarettes, desired to keep smokers dependent once  
26 they started?

27 A. Yes.

28 Q. That's a choice the company made?

29 A. Yes.  
30 Q. Did Philip Morris know to a degree of  
31 substantial certainty that regular smokers would  
32 become dependent on or addicted to cigarettes?  
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1 MR. GAY:  
2 Objection. Outside his qualifications.  
3 THE COURT:  
4 I'm going to overrule the objection with  
5 these instructions: Answer if you know of  
6 your own knowledge and only during the time  
7 you were employed at Philip Morris.

8 A. I know what I was told.  
9 EXAMINATION BY MR. STEPHEN HERMAN:

10 Q. And what were you told?  
11 A. Well, for the cigarettes that were above  
12 three milligrams by the Federal Trade Commission,  
13 FTC, the answer is we knew that people would  
14 maintain their dependence on those cigarettes. For  
15 the ones that were below that, it was believed or  
16 concluded at that time that they would not.

17 Q. Based on your personal knowledge from the  
18 time period that you were at Philip Morris, did  
19 Philip Morris know, to a degree of substantial  
20 certainty, that because of the way their cigarettes  
21 were designed and made, regular smokers would be  
22 significantly exposed to a hazardous substance or  
23 substances?

24 MR. GAY:  
25 Objection. Outside his qualifications.  
26 THE COURT:  
27 Overruled. Answer the question if  
28 you're able to.

29 A. Yes, they did.  
30 EXAMINATION BY MR. STEPHEN HERMAN:  
31 Q. Based on your personal knowledge from the  
32 time period that you were at Philip Morris, did  
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1 Philip Morris know to a degree of substantial  
2 certainty that regular smokers, due to this  
3 exposure, would suffer a significantly increased  
4 risk of harm?

5 MR. GAY:  
6 Same objection, Your Honor.  
7 THE COURT:  
8 The same ruling. Answer the question if  
9 you're able to.

10 A. Yes, they did.  
11 EXAMINATION BY MR. STEPHEN HERMAN:  
12 Q. Now, with respect to the other defendants,  
13 you've read thousands of internal documents; is that  
14 correct?

15 A. Yes.

16 Q. And have you participated in government  
17 studies?

18 A. Yes.

19 Q. Have you conducted patent searches?

20 A. I have.

21 Q. And while you were at Philip Morris, did you

22 study the competitive products?  
23 A. We did, yes.  
24 Q. Based on everything you know, is it your  
25 expert opinion that the other defendants, RJR, Brown  
26 & Williamson and Lorillard, also desired that  
27 smokers become dependent upon or addicted to  
28 nicotine?  
29 MR. WITTMANN:  
30 Objection, Your Honor. No foundation.  
31 MR. SCHNEIDER:  
32 Objection.  
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1 MR. LONG:  
2 Objection.  
3 THE COURT:  
4 Overruled. Answer the question if  
5 you're able to.  
6 A. Based on the documents I've read, I see no  
7 difference in the conduct of the other companies  
8 compared to Philip Morris.  
9 EXAMINATION BY MR. STEPHEN HERMAN:  
10 Q. Based on everything you know now, is it your  
11 expert opinion that the other defendants, RJR, Brown  
12 & Williamson and Lorillard, knew to a degree of  
13 substantial certainty that smokers would suffer a  
14 significantly increased risk of developing latent  
15 illness or disease?  
16 MR. WITTMANN:  
17 Same objection, Your Honor.  
18 THE COURT:  
19 Overruled. Answer the question if  
20 you're able to.  
21 MR. WITTMANN:  
22 May I make it continuing, Your Honor?  
23 May I make it continuing so I don't have to  
24 keep interrupting?  
25 THE COURT:  
26 Yes.  
27 A. Based on the information I have read and  
28 comparing it with what I knew from Philip Morris,  
29 yes.  
30 EXAMINATION BY MR. STEPHEN HERMAN:  
31 Q. You mentioned something called the Cambridge  
32 brand. Is that the same thing as the Cambridge pad  
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1 that's used in the FTC filter?  
2 A. No, it's not the same thing. It was named  
3 after the pad.  
4 Q. It was named after it?  
5 A. Yes.  
6 Q. Can you tell us about that?  
7 A. Well, basically when the project was  
8 initiated, the project had a code name called  
9 Trinity. And the Trinity project was to make the  
10 lowest delivery cigarette.  
11 And it's called Trinity because there were  
12 actually three variations of that product, only one  
13 of which was the lowest one. But the thing that  
14 everybody knows about is that the Cambridge pad was



15 used in the Federal Trade Commission test to  
16 essentially remove all of the total particulate  
17 material.

18 So if you could make a cigarette that had a  
19 filter that was as good as the Cambridge pad, then  
20 you would essentially be removing all of the total  
21 particulate material, which includes the tar and the  
22 nicotine and water. And you would thereby make the  
23 lowest delivery cigarette. So that's why it was  
24 named after the Cambridge pad.

25 Q. Now, Dr. Henningfield and some of the other  
26 witnesses have testified about the FTC method. And  
27 we're just going to go through it very briefly.

28 Can you give the jury an insider's  
29 perspective on the things that you can do to deliver  
30 more tar or more nicotine to the smoker than will  
31 show up on the FTC method?

32 MR. LONG:

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1 Objection. May we approach?

2 THE COURT:

3 Yes.

4 (Whereupon a bench conference is held at  
5 this time as follows:)

6 MR. LONG:

7 The objection is based on conflict  
8 preemption and the FTC's jurisdiction. We've  
9 already heard evidence that the FTC tells the  
10 companies what tests they have to use; and  
11 when they get the numbers, they have to put  
12 them on their pack. The FTC has jurisdiction  
13 to enforce violations.

14 He's trying to get the witness to  
15 testify that the companies somehow cheated  
16 or misled the FTC, which is clearly not a  
17 viable cause of action. Under Buckman,  
18 there's no cause of action for fraud against  
19 a federal agency that has jurisdiction over  
20 you; but, again, it's conflict preemption.  
21 The company had to use the test, had to  
22 report the figures.

23 MR. STEPHEN HERMAN:

24 Your Honor, can I respond?

25 THE COURT:

26 I understand what the basis of your  
27 objection is, but I don't think the question  
28 is calling for information that you're  
29 objecting to in your objection.

30 He wants to know if this witness knows  
31 of ways that the cigarette can deliver more  
32 tar and nicotine to the smoker than is

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1 measured by the machine.

2 That doesn't have anything to do with  
3 the requirement that you use the machine and  
4 publish the numbers that the machine produces  
5 on a test, Mr. Long.

6 MR. LONG:

7 Well, our position is it's a roundabout

8 way of saying that the companies know how to  
9 cheat the machine, which is the conflict  
10 preemption.  
11 THE COURT:  
12 The objection is overruled.  
13 (Whereupon the bench conference is  
14 concluded at this time.)  
15 MR. LONG:  
16 May we have a continuing objection?  
17 THE COURT:  
18 Yes.  
19 Answer the question, please, if you're  
20 able to.  
21 MR. STEPHEN HERMAN:  
22 Do you remember the question?  
23 THE WITNESS:  
24 I don't remember the question, I'm  
25 sorry.  
26 EXAMINATION BY MR. STEPHEN HERMAN:  
27 Q. I think it was whether you can give the jury  
28 an insider's perspective on the things that you can  
29 do to deliver more tar or nicotine to the smoker  
30 than will show up on the FTC machine?  
31 A. Yes, I can.  
32 Q. And have you brought with you a list of those  
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1 things?  
2 A. Yes, I have.  
3 MR. STEPHEN HERMAN:  
4 Can we put up WF-21 for counsel and the  
5 witness and The Court, please?  
6 EXAMINATION BY MR. STEPHEN HERMAN:  
7 Q. Is this the list?  
8 A. (Witness reviews document.) Yes, it is.  
9 MR. STEPHEN HERMAN:  
10 May we publish, Your Honor?  
11 THE COURT:  
12 You may publish.  
13 EXAMINATION BY MR. STEPHEN HERMAN:  
14 Q. Now, we've heard a lot about compensation, so  
15 we're just going to completely take compensation and  
16 the way people smoke out of the equation and look at  
17 it just from the point of view of what the  
18 manufacturer can do to the cigarette.  
19 Is that your understanding?  
20 A. That's what this list is. It does not  
21 include anything about compensation. That's a  
22 totally separate issue. This is --  
23 Q. And you're not -- Oh, I'm sorry.  
24 A. This is simply a list of what happens when  
25 you put the cigarette into the machine and what you  
26 can do in the machine itself.  
27 Q. And you're not saying that all of the  
28 companies used all of these techniques in all of  
29 their products; is that right?  
30 A. No, I'm not.  
31 Q. It's just to show what the industry, with its  
32 superior knowledge, could have done?  
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1 A. That's correct.  
2 Q. Okay. We've heard about increased --  
3 MR. LONG:  
4 Your Honor, objection. Speculation.  
5 May I approach?  
6 THE COURT:  
7 You may approach.  
8 (Whereupon a bench conference is held at  
9 this time as follows:)  
10 MR. LONG:  
11 Your Honor, the witness has just  
12 testified that he's not saying that all the  
13 companies did all of these things. He's not  
14 saying that they did any of them, but that  
15 they could have done them. That's just rank  
16 speculation and it's irrelevant.  
17 THE COURT:  
18 Yes, I agree.  
19 MR. STEPHEN HERMAN:  
20 To show the industry --  
21 THE COURT:  
22 No, he's talking about there's no  
23 testimony that any -- Turn your machine off  
24 if it's not off. You've got the mute on.  
25 Okay.  
26 The objection is that, by definition,  
27 your question asks for speculation. And it's  
28 probative of nothing. It's just speculation  
29 as to what they could have done. There's no  
30 testimony that any of them did it.  
31 MR. STEPHEN HERMAN:  
32 Okay.

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1 THE COURT:  
2 And I think it's a good objection. That  
3 objection is sustained.  
4 MR. LONG:  
5 And he's already said that he's not  
6 going to testify that they actually did it.  
7 THE COURT:  
8 Yes.  
9 MR. LONG:  
10 I just want to note that for the record  
11 if they go back and try to change that.  
12 THE COURT:  
13 Yes.  
14 And if you look at your exhibit, your  
15 preface to this question seems to exclude the  
16 smoking habits of humans, but your demo  
17 doesn't.  
18 MR. LONG:  
19 It's cheat the machine. That's the  
20 objection I made earlier.  
21 THE COURT:  
22 No. Well, look at the third-to-last  
23 thing. See? That's not a machine. That's  
24 not a machine-cheating method. That's a  
25 method to make real smokers get a different  
26 result than the machine.  
27 I'm going to sustain the objection.  
28 MR. STEPHEN HERMAN:

29 Okay, Your Honor.  
30 (Whereupon the bench conference is  
31 concluded at this time.)  
32 THE COURT:  
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1 The objection is sustained. Don't  
2 answer the question.  
3 MR. LONG:  
4 Can we move to strike the prior  
5 testimony? Or you can leave it in. Never  
6 mind.  
7 THE COURT:  
8 Excuse me? Never mind?  
9 MR. LONG:  
10 We can leave the prior testimony in.  
11 THE COURT:  
12 Yes.  
13 Next question, please.  
14 EXAMINATION BY MR. STEPHEN HERMAN:  
15 Q. Did Philip Morris use fast-burning paper?  
16 A. Yes, they did in some of their products.  
17 Q. There is on the bottom of this chart  
18 something that says "Increase Delivery in the First  
19 Few Puffs."  
20 Would you explain what that means?  
21 A. Yes. The cigarette, when you light it --  
22 MR. LONG:  
23 Objection, Your Honor. May I approach?  
24 THE COURT:  
25 Yes.  
26 (Whereupon a bench conference is held at  
27 this time as follows:)  
28 MR. LONG:  
29 We just went through the fact that the  
30 things on this chart can't say that all the  
31 companies did them. He's not saying that any  
32 of the companies did them. What's the  
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1 relevance of running through this list of  
2 potentialities? It's mere speculation.  
3 THE COURT:  
4 Well, I don't understand -- Have you a  
5 response you wanted to tell me?  
6 MR. STEPHEN HERMAN:  
7 I'll withdraw the question and go on.  
8 That's fine.  
9 THE COURT:  
10 Mr. Sholes wants to say something.  
11 MR. SHOLES:  
12 Your Honor, when we place a chart on the  
13 board and then come up to talk to The Court,  
14 even the jurors are now writing down what  
15 they see on the chart. If The Court should  
16 decide to not allow the testimony, the jurors  
17 are still writing it down.  
18 THE COURT:  
19 I overruled the objection to the demo  
20 yesterday. It was a question that was  
21 objected to, not the demo.

22 The question is withdrawn.  
23 (Whereupon the bench conference is  
24 concluded at this time.)  
25 EXAMINATION BY MR. STEPHEN HERMAN:  
26 Q. Dr. Farone, I'm going to withdraw that  
27 question and just move on.  
28 You can take down this chart.  
29 Now, the defendants showed us a letter last  
30 week that was written by all of the defendants  
31 together to the FTC in the 1960s. Are you familiar  
32 with that letter?  
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1 A. If it's the one that was written in 1966, I  
2 am.  
3 Q. And that letter recommended that the FTC  
4 adopt a method where you would measure tar and  
5 nicotine per puff rather than per cigarette.  
6 My question to you is would there have been  
7 ways available to the tobacco industry while you  
8 were in Philip Morris to have achieved through the  
9 design of the cigarettes a similar result if there  
10 had been a per-puff requirement?  
11 A. Yes. As a matter of fact, that's part of the  
12 design of the cigarette is to take into account the  
13 chemicals delivered or the nicotine or the tar per  
14 puff.  
15 Q. We discussed additives and ingredients  
16 briefly. How much of a cigarette is made up of  
17 additives or chemicals other than tobacco itself?  
18 A. It varies widely. In some cigarettes, it can  
19 be as high as 20 to 25 percent; in some, it can be  
20 as low as 5 to 7 percent.  
21 Q. Well, let's take Marlboro, for example. What  
22 are the non-tobacco chemical compounds that are in  
23 Marlboro?  
24 A. Well, there are many of them. But there's,  
25 at various times, they have changed. I don't know  
26 exactly what time we're talking about.  
27 But, generally speaking, it's had things in  
28 it like cocoa shells, licorice, propylene glycol,  
29 glycerin, sugar of various types, St. John's wort or  
30 varieties thereof, valerian roots, wine, various  
31 kinds of things added to it.  
32 Q. When you were at Philip Morris, did you know  
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1 exactly what was in a Marlboro?  
2 A. Not exactly. That was secret. But we did  
3 know generically or generally, and some of them were  
4 mentioned at various of the meetings, so I would say  
5 I probably knew 10 percent or 15 percent of the  
6 things that were in there.  
7 Q. Have you brought with you a chart to help  
8 illustrate to the jury the types of things that are  
9 added to tobacco in the manufacture of cigarettes?  
10 A. I have.  
11 MR. STEPHEN HERMAN:  
12 Can you show The Court and counsel and  
13 the witness WF-39?  
14 EXAMINATION BY MR. STEPHEN HERMAN:

15 Q. Is that the chart?  
16 A. (Witness reviews document.) Yes, it is.  
17 Q. What is this?  
18 A. This is a chart that I prepared for  
19 discussions with the Centers for Disease Control on  
20 additives, which just goes through some of the  
21 additives, what the named chemical is in that  
22 additive, and what is known about that chemical.  
23 MR. STEPHEN HERMAN:  
24 Okay. May we publish, Your Honor?  
25 THE COURT:  
26 You may publish.  
27 EXAMINATION BY MR. STEPHEN HERMAN:  
28 Q. There's a lot of stuff on the chart. Maybe  
29 we could just -- if you could pick a couple examples  
30 and go through them.  
31 A. Okay. I'd like to start off by saying that  
32 we're not saying that these effects occur in the  
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1 cigarettes. Because we don't --  
2 Q. I'm sorry to interrupt.  
3 A. Because we don't know exactly how much of  
4 this is added and we don't know whether it's enough  
5 to create the effects you see here. The purpose of  
6 this is to talk about basically the kind of testing  
7 that should be done.  
8 But let's take cocoa, cocoa shells,  
9 chocolate. What we do know is that if you burn  
10 cocoa shells, the tar from burning the cocoa shells  
11 is extremely mutagenic; that is, it causes mutations  
12 to a very high degree. We know that all of these  
13 things, cocoa, cocoa shells and chocolate, contain  
14 theobromine, which is a chemical, and some caffeine.  
15 And we know that those chemicals, you can  
16 look up in the standard reference books and find out  
17 they have these properties. Now, again, I'm not  
18 saying that in the amounts in the cigarettes giving  
19 those properties to the smoker. However, they do  
20 give the smoker some taste, some flavor, some  
21 sensation which has been judged over the years. And  
22 they are used to significant levels, so --  
23 Q. Well, "respiratory stimulant," what does that  
24 mean?  
25 A. That means, for example, that it makes it  
26 easier to breathe for asthmatics and things of that  
27 sort.  
28 Q. And bronchodilator?  
29 A. A similar kind of thing.  
30 Q. Cardiotonic?  
31 A. Well, that has to do with your heartbeat.  
32 Q. Okay. And was there a study at Philip Morris  
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1 about the effects of cocoa shells or burning cocoa  
2 shells?  
3 A. No, what we did at Philip Morris was to look  
4 at all the literature about cocoa shells. I think  
5 it was about 1978 when we did that. And determined  
6 that in the literature that was already available,  
7 we knew that the materials produced by the burning

8 of cocoa shells were potentially carcinogenic,  
9 highly mutagenic.  
10 Q. Can you give us an idea -- you've touched on  
11 this a little bit -- of the quantities in which  
12 these chemicals actually appear in cigarettes and  
13 the effect or the significance of that?  
14 A. The chemicals or the additives?  
15 Q. The additives, I'm sorry.  
16 A. The additives are, again, in small amounts.  
17 I mean, the cocoa shells could be one or two  
18 percent, maybe three percent. Sugars are higher.  
19 Many of these are only added to a tenth of a percent  
20 or less. So they're just flavorants. But, again,  
21 the fact that it's a small amount added, depending  
22 on the chemical that's produced, doesn't mean that  
23 it's safe.  
24 Q. I see that there is licorice root?  
25 A. Yes.  
26 Q. What is that?  
27 A. That should be right here (indicating).  
28 Q. Okay. And can you tell the jury a little bit  
29 about the addition of licorice and licorice  
30 compounds?  
31 A. Well, in many cigarettes, the cocoa, cocoa  
32 shells or chocolate is used in combination with the  
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1 licorice. It gives a characteristic flavor to the  
2 smoke. And, again, you'll notice that it has a  
3 material which is also a bronchodilator, as does the  
4 cocoa shells.  
5 Again, I'm not saying that these amounts of  
6 this chemical in smoke -- because that study has not  
7 been done -- are sufficient to give you that effect,  
8 but it is well known that that effect can occur.  
9 And the reason for this chart was to suggest that  
10 those studies should be done which should determine  
11 whether or not these materials have that effect in  
12 the amounts that they're used.  
13 Q. Were those studies done at Philip Morris  
14 while you were there?  
15 A. No, they were not.  
16 Q. Was it your opinion that they should have  
17 been done?  
18 A. Yes.  
19 Q. Was that opinion expressed?  
20 A. It was discussed on many occasions, yes.  
21 Q. One thing that I don't know what it is, so  
22 I'd like to ask you about is pyridine. What is  
23 that?  
24 A. Pyridine is a chemical that is a flavorant  
25 that has been used in foods in very, very tiny  
26 amounts. It has an interesting property of  
27 affecting your central nervous system like, a little  
28 bit like what nicotine does. But it doesn't have  
29 the effect on your peripheral nervous system, that  
30 is, it doesn't change your heartbeat or change your  
31 blood pressure.

32 So it's one of those chemicals that's a  
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1 little bit like nicotine. As a matter of fact,  
2 nicotine is made up of two pieces. And one piece of  
3 the nicotine molecule is pyridine.  
4 Q. And we have nutmeg powder and oil.  
5 A. Well, those are just things that have been  
6 added to cigarettes. These came off a list of some  
7 599 things that were added to cigarettes and  
8 disclosed to the Centers for Disease Control.  
9 Q. How were they disclosed?  
10 A. There was a request -- I think the first one  
11 was probably 1984 or '85. I have two versions of a  
12 list, one from about '85 or '86 and one from 1994.  
13 Q. Was the list submitted by each company or  
14 product by product?  
15 A. No, at that time for those lists, the  
16 industry got together and submitted a list jointly  
17 from all of the manufacturers in terms of what they  
18 put into their products, what additives they used.  
19 MR. STEPHEN HERMAN:  
20 I think we're at a good stopping point,  
21 Your Honor.  
22 THE COURT:  
23 We'll recess till 3:00 o'clock by the  
24 wall clock.  
25 (Whereupon the jury is excused at this  
26 time.)  
27 THE COURT:  
28 Let the record reflect that the jury has  
29 left the courtroom.  
30 Anything for the record by plaintiffs?  
31 MR. STEPHEN HERMAN:  
32 No, Your Honor.

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1 THE COURT:  
2 Defense?  
3 MR. WITTMANN:  
4 No, Your Honor.  
5 MR. LONG:  
6 Yes, Your Honor.  
7 MR. SHOLES:  
8 Yes, Your Honor.  
9 MR. SHOLES:  
10 All right. I'll go first, Mr. Long.  
11 Your Honor, my request is based upon  
12 process. When The Court has a bench  
13 conference and the exhibit is still on the  
14 screen, The Court may decide to not allow  
15 certain of the testimony relating to that  
16 exhibit to be admitted.  
17 If the exhibit stays on the screen,  
18 we've noticed that some jurors are taking  
19 down that information. We can no longer  
20 control the information that gets to the  
21 jury. It is a request that when a bench  
22 conference is held, that the exhibits be  
23 taken off the screen.  
24 THE COURT:  
25 Anything else?  
26 MR. LONG:  
27 Yes, Your Honor.  
28 I have an objection and a motion to



29                   urge. But I would prefer to do it outside  
30                   the presence of the witness, please.  
31                   THE COURT:  
32                   Step outside the courtroom, please.  
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1                   THE WITNESS:  
2                   Sure.  
3                   (Whereupon the witness is excused at  
4                   this time.)  
5                   THE COURT:  
6                   Mr. Sholes, I'd suggest that somebody  
7                   make that motion when the situation, as  
8                   you've described, occurs if you wish that  
9                   relief.  
10                  MR. SHOLES:  
11                  Thank you, Your Honor.  
12                  THE COURT:  
13                  Mr. Long?  
14                  MR. LONG:  
15                  Your Honor, the defendants move to  
16                  strike the entirety of the witness' testimony  
17                  on the additive issue. We sat by and waited  
18                  and waited without objection to the witness  
19                  to link it up to some relevance to this case.  
20                  That didn't happen. Instead, all we have is  
21                  an illusion of relevance.  
22                  The witness testified that he couldn't  
23                  say that, in the amounts those ingredients  
24                  were used in cigarettes, that they had an  
25                  impact. He testified that he couldn't say  
26                  they were safe. He said the chart suggested  
27                  that further studies should be done.  
28                  He never said they increased the risk of  
29                  addiction or increased the risk of harm for  
30                  any class member. All he gave was his bald  
31                  opinion they should have done the test.  
32                  But there's no relevance to the supposed  
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1                   injuries of addiction or increased risk or  
2                   manifest injury to the case. It's just sheer  
3                   speculation floating out there for the jurors  
4                   to try to link it up with some relevance.  
5                   THE COURT:  
6                   Response?  
7                   MR. STEPHEN HERMAN:  
8                   It's relevant to a number of things,  
9                   including alternative feasible design,  
10                  feasible design, "the gentlemen's agreement,"  
11                  the fact that they didn't do the testing that  
12                  they were supposed to. It goes to intent.  
13                  And that they put it in there -- I mean,  
14                  we're not even done with the line of  
15                  questioning, so I think the objection is kind  
16                  of premature -- but it shows that they're  
17                  trying to addict people if they're putting  
18                  bronchodilators in cigarettes.  
19                  MR. LONG:  
20                  Your Honor, the witness said that he  
21                  couldn't say the amount in the cigarettes, if

22 any --  
23 MR. STEPHEN HERMAN:  
24 Because you didn't do the testing.  
25 THE COURT:  
26 One at a time.  
27 MR. STEPHEN HERMAN:  
28 I'm sorry.  
29 MR. LONG:  
30 He didn't say that the amount of these  
31 chemicals in the cigarettes did anything. He  
32 didn't say they addicted people, he didn't  
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1 say they increased the risk.  
2 THE COURT:  
3 Motion to strike denied.  
4 We'll recess until 3:00 o'clock.  
5 (Whereupon a brief recess was taken at  
6 this time from 2:47 o'clock p.m. to 3:03  
7 o'clock p.m.)  
8 THE BAILIFF:  
9 All rise for the jury, please.  
10 (Whereupon the jury joins the  
11 proceedings at this time.)  
12 THE LAW CLERK:  
13 Recess is over. Court will come to  
14 order.  
15 THE COURT:  
16 Please be seated.  
17 Mr. Herman.  
18 MR. STEPHEN HERMAN:  
19 Thank you, Your Honor.

20 EXAMINATION BY MR. STEPHEN HERMAN:  
21 Q. Dr. Farone, are you familiar with the term  
22 GRAS, generally recognized as safe?  
23 A. Yes, I am.  
24 Q. Briefly, what does that mean?  
25 A. Generally recognized as safe as usually used  
26 -- There's two uses of that. One is with foods.  
27 And there's a list of things that you can put in  
28 foods at very low levels which, for use in foods,  
29 are generally recognized as safe. Various agencies  
30 of the government have a list like that and various  
31 organizations which deal with manufacturing foods  
32 have a list.  
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1 There's another use of it in context with  
2 drugs like toothpaste that we were talking about  
3 yesterday where there's two words, GRAS, generally  
4 recognized as safe, and then there's GRAE, sometimes  
5 called GRAE but it means generally recognized as  
6 effective.  
7 So when you have a drug, there's two parts:  
8 It has to be generally recognized as safe and  
9 generally recognized as effective if you don't need  
10 to file some special papers with the government.  
11 For foods, it's just generally recognized as safe.  
12 Q. Does the mere approval of a compound on a  
13 GRAS list tell you anything about whether that  
14 compound is safe in cigarettes?

15 A. No, it doesn't. For two reasons: One is  
16 that, first of all, in a cigarette, you burn it. So  
17 not only do you have the material itself but you  
18 have all of the combustion, pyrolysis products from  
19 that material.

20 And the second thing is, as I indicated  
21 earlier, the levels of a potential toxicity are  
22 different depending on whether you eat it and it  
23 goes through your stomach or whether you inhale it  
24 and it goes in your lungs.

25 Q. I'm going to switch gears a little bit here.

26 The defendants have suggested that Dr. Wynder  
27 recommended back in the fifties or sixties a 40  
28 percent reduction in tar, according to the FTC  
29 method. With everything we know now, was Wynder  
30 right or was he wrong?

31 MR. LONG:

32 Objection, Your Honor.

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1 THE COURT:

2 Sustained. Don't answer that question.

3 The next question.

4 EXAMINATION BY MR. STEPHEN HERMAN:

5 Q. It's my understanding that at some point the  
6 defendants paid Dr. Wynder to do some research. Do  
7 you know anything about that?

8 A. Several different researches as far as I  
9 know, yes.

10 Q. Now, let's leave that aside.

11 Did Dr. Wynder ever, to your knowledge, own a  
12 cigarette company?

13 A. No, not to my knowledge.

14 Q. Did he run a cigarette company?

15 A. No.

16 Q. Did he put his name on a cigarette product?

17 A. Not that I'm aware of.

18 Q. Did he sell a cigarette product?

19 A. Not that I'm aware of.

20 Q. Did Dr. Wynder, to your knowledge, have 600  
21 scientists underneath him that he could put to work  
22 like Philip Morris did?

23 A. No.

24 Q. Did Dr. Wynder, to your knowledge, have  
25 billions of dollars in resources at his disposal?

26 MR. LONG:

27 Objection, Your Honor.

28 THE COURT:

29 Overruled. Answer the question if  
30 you're able to.

31 A. No, he did not.

32 EXAMINATION BY MR. STEPHEN HERMAN:

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1 Q. Did Dr. Osdene or Dr. Wakeham or Dr. Seligman  
2 or anyone in upper management from New York ever  
3 come into your office and say that we should try to  
4 implement this design change or that design change  
5 because Dr. Wynder or the Surgeon General thought it  
6 might be a good idea?

7 A. Not to my knowledge. I mean, no, the answer

8 is no.  
9 Q. And, in fact, the tobacco industry criticized  
10 Dr. Wynder and some of his tests; didn't they?  
11 A. They did.  
12 Q. Based on the state-of-the-art, the research  
13 that had been conducted, the research that could  
14 have been conducted, given the resources and the  
15 technology available, in your opinion, is a 70  
16 percent reduction in FTC tar the best that the  
17 industry could have done to make their product  
18 safer?

19 MR. LONG:  
20 Objection. Speculation. Lacks  
21 foundation.

22 THE COURT:  
23 Overruled. Answer that question if  
24 you're able to.

25 A. Based on the things that I've shown today and  
26 we've talked about, they could have done much better  
27 than a 70 percent reduction in tar.

28 EXAMINATION BY MR. STEPHEN HERMAN:

29 Q. Defendants' criticisms of Dr. Wynder's and  
30 others' mouse-skin paintings, were there, in your  
31 opinion as a chemist, some problems with the mouse  
32 skin test?

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1 A. Yes, there were.  
2 Q. What are those problems?  
3 A. Well, it's very well known that the skin of a  
4 mouse isn't the same as lung tissue, for example.  
5 They're different kinds of cells. However, the idea  
6 that it can be used as a measure was accepted  
7 because it's difficult to do tests on lung tissues  
8 in the same manner.

9 And at the time that test was used, it was  
10 generally accepted throughout the industry to use  
11 either mice or rats, either by feeding them,  
12 painting it on their skin, injecting it under their  
13 skin or otherwise providing the mouse or the rat  
14 with the chemical to see what would happen.

15 So there were problems because skin tissue  
16 isn't the same, and that's not the same mechanism  
17 necessarily, but it is helpful in giving an overall  
18 perception or understanding of how the chemical  
19 interacts with living cells.

20 Q. But as a chemist, in your opinion, the  
21 mouse-skin paintings that indicted cigarettes that  
22 the defendants criticized, they were actually biased  
23 in favor of the cigarette industry; is that right?

24 A. That is correct.

25 Q. Would you say that Philip Morris scientists  
26 relied upon FTC tar and nicotine delivery as  
27 determinative of how safe that cigarette was?

28 A. They did not, to my knowledge.

29 Q. And if you reduce generally the level of tar,  
30 is it possible that the tar you're left with is more  
31 toxic?

32 A. That's possible, yes.

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1 MR. STEPHEN HERMAN:  
2 For the witness and The Court and  
3 counsel, I would like to pull up Scott Trial  
4 Exhibit 3992.01.  
5 EXAMINATION BY MR. STEPHEN HERMAN:  
6 Q. Can you see that, Dr. Farone?  
7 A. Yes, I can.  
8 Q. What is this document?  
9 A. (Witness reviews document.) This is a report  
10 on research that was done to help my director, among  
11 others, determine the relative toxicity of some  
12 different types of cigarettes, prototype cigarettes,  
13 in which I received a copy and I participated in the  
14 study itself.  
15 Q. And on the first page, you're on the  
16 distribution list?  
17 A. Yes.  
18 Q. And what's the date of this?  
19 A. Well, it's May 15th, 1981.  
20 Q. And what was your position in 1981?  
21 A. Director of Applied Research.  
22 Q. If we go to Page 20, does the document  
23 indicate that you were suggesting some of this  
24 research be done?  
25 A. Yes, the last paragraph at the bottom of Page  
26 20.

27 MR. STEPHEN HERMAN:  
28 Your Honor, at this time we would offer  
29 Scott Trial Exhibit 3992.01.

30 THE COURT:  
31 Objection?

32 MR. GAY:  
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1 Not at this time, Your Honor.  
2 THE COURT:  
3 The document will be received.  
4 MR. STEPHEN HERMAN:  
5 Thank you, Your Honor.  
6 If we could go to Page 26, Carl.  
7 Can we publish that, Your Honor?  
8 THE COURT:  
9 You may publish it.  
10 MR. STEPHEN HERMAN:  
11 Can we blow up the graph, please, Carl?  
12 Thank you very much.

13 EXAMINATION BY MR. STEPHEN HERMAN:  
14 Q. Dr. Farone, what is this?  
15 A. This is a graph that actually shows results  
16 in a so-called Ames test done with two different  
17 means of doing it. But the basic utility of it for  
18 me at the time is that the things that you see  
19 further up and to the right on this chart have, in  
20 that test, have an increased level of activity than  
21 things that are lower on the chart.  
22 And this kind of information was used by us  
23 to see whether or not some of the things we were  
24 talking about in terms of changes had the potential  
25 of changing the mutation, mutagenicity as measured  
26 by this test.  
27 Q. Well, when you say "activity," what does that  
28 mean?

29 A. Biological activity. In this case, we're  
30 talking about the number of bacteria that mutate.  
31 Q. So is that something bad or good?  
32 A. Well, that's bad. I mean, you don't want  
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1 things to mutate, you don't want things to change  
2 based on a mutation.  
3 Q. What does low-tar reference mean?  
4 A. That's a cigarette that was used to be the  
5 reference cigarette in these tests from one time to  
6 another so that you could study other low-tar  
7 cigarettes relative to that reference. It's typical  
8 of low-tar cigarettes sold on the market in that  
9 time frame, 1981.  
10 Q. And according to this test, to this graph,  
11 what's worse? A low-tar reference or the Kentucky  
12 reference?  
13 A. Well, the Kentucky reference is the 2R1  
14 control. And the low-tar reference is worse.

15 MR. STEPHEN HERMAN:  
16 Thank you. Before we leave this, can we  
17 go to Page 35, please?  
18 May we publish, Your Honor?  
19 THE COURT:  
20 You may publish it.  
21 MR. STEPHEN HERMAN:  
22 Can you blow up the heading in italics  
23 at the top, please?

24 EXAMINATION BY MR. STEPHEN HERMAN:  
25 Q. It says, "Acetaldehyde is Highly Active."  
26 What does that mean?  
27 A. Well, in the test, acetaldehyde was one of  
28 the things that was looked at. And, actually, the  
29 suggestion that I had made that was part of this  
30 test was to look at the effects of sugar and whether  
31 or not sugar would increase or decrease the  
32 activity.  
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1 And the reason for that is that sugar, when  
2 you burn it, gives off a lot of acetaldehyde. And  
3 so acetaldehyde was studied independently of it  
4 being in the sugar that was added.  
5 Q. Is this chemical, acetaldehyde, is that the  
6 same thing that Dr. DeNoble was investigating as a  
7 positive reinforcer?  
8 A. Yes.

9 MR. STEPHEN HERMAN:  
10 We can take that down.  
11 EXAMINATION BY MR. STEPHEN HERMAN:  
12 Q. Can you tell us, based on your experience,  
13 what manufacturers have done when their customers  
14 have been exposed to hazardous or toxic substances  
15 based on your experience?  
16 MR. LONG:  
17 Objection. Speculation. Vague as well.  
18 MR. GAY:  
19 Relevance.  
20 MR. SCHNEIDER:  
21 And preemption.

22 THE COURT:  
23 I sustain the relevance objection.  
24 Don't answer that question.  
25 The next question, please.  
26 EXAMINATION BY MR. STEPHEN HERMAN:  
27 Q. Dr. Farone, are you aware that this case is  
28 about developing medical monitoring testing  
29 programs?  
30 A. Yes.  
31 Q. And do you have any experience, personal,  
32 firsthand experience, with medical monitoring  
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1 programs at Lever Brothers and/or Philip Morris?  
2 A. I do.  
3 Q. Can you tell us about your experience with  
4 medical monitoring at Lever Brothers?  
5 MR. WITTMANN:  
6 Objection, Your Honor. Beyond the scope  
7 and relevance.  
8 THE COURT:  
9 I sustain the relevance objection to the  
10 question involving Lever Brothers. You may  
11 answer the question with regard to Philip  
12 Morris.  
13 A. I have experience there, too, yes.  
14 EXAMINATION BY MR. STEPHEN HERMAN:  
15 Q. Can you tell the jury about your experience  
16 with medical monitoring at Philip Morris?  
17 A. Yes.  
18 I had working for me a man by the name of  
19 David Clark, who was diagnosed with tuberculosis.  
20 Mr. Clark was the first manager of a division that  
21 worked for me. And Mr. Clark was -- contacted other  
22 people, both in his division and around the Research  
23 & Development Center.  
24 And we had a meeting to discuss what we  
25 should do about that. And I recommended that we  
26 have a monitoring program for people who might have  
27 been exposed to him. And the objective of that was  
28 to have tuberculosis testing done for the employees  
29 that might have been exposed to him.  
30 We later found out that the tuberculosis  
31 could have originated from the ventilation system,  
32 because there was some failure in the ventilation  
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1 system, and there was concern that the bacteria that  
2 causes tuberculosis might be in that system.  
3 So the medical monitoring for tuberculosis  
4 was extended to the entire Research & Development  
5 Center. And anyone who tested positive -- for whom  
6 the positive test or who then tested positive  
7 previously in their lives was then asked to have a  
8 chest X-ray and determine whether or not they had  
9 tuberculosis so they wouldn't affect the other  
10 people.  
11 Q. Thank you.  
12 MR. WITTMANN:  
13 Objection, Your Honor. I move to  
14 strike.

15 May I approach?  
16 THE COURT:  
17 Yes.  
18 (Whereupon a bench conference is held at  
19 this time as follows:)  
20 THE COURT:  
21 Mr. Wittmann?  
22 MR. WITTMANN:  
23 Yes, Your Honor.  
24 This case is not about tuberculosis.  
25 This has nothing to do with the medical  
26 monitoring being sought by the plaintiffs in  
27 this case. And the type of monitoring they  
28 were doing for tuberculosis, the disease, is  
29 completely different from any medical  
30 monitoring in connection with the diseases  
31 sought in this case.

32 THE COURT:  
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1 It's marginally relevant. Your  
2 objection is overruled. The motion to strike  
3 is denied.  
4 (Whereupon the bench conference is  
5 concluded at this time.)

6 THE COURT:  
7 Next question.  
8 EXAMINATION BY MR. STEPHEN HERMAN:  
9 Q. I think you testified yesterday that you  
10 watched the congressional testimony in 1994.  
11 A. I did, yes.  
12 Q. Do you remember when the President of Philip  
13 Morris testified to Congress that Philip Morris did  
14 not believe that nicotine was addictive?

15 MR. GAY:  
16 Objection, Your Honor.  
17 THE COURT:  
18 Overruled. Answer the question if you  
19 are able to.

20 A. I recall distinctly when he said I do not  
21 believe that cigarettes -- that cigarettes are  
22 addictive or that nicotine is addictive. He said it  
23 in his sentence.

24 EXAMINATION BY MR. STEPHEN HERMAN:  
25 Q. Did Philip Morris believe that cigarettes  
26 were addictive when you were there?

27 A. Yes.  
28 Q. Do you remember when the President of Philip  
29 Morris testified that Philip Morris did not  
30 manipulate nicotine?

31 A. Yes, I do.  
32 Q. Was that true?

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1 A. Not totally true, no, not -- They did  
2 manipulate nicotine.

3 MR. STEPHEN HERMAN:  
4 I'd like to pull up Scott Exhibit 3743,  
5 please, for counsel and The Court and the  
6 witness.

7 EXAMINATION BY MR. STEPHEN HERMAN:



8 Q. What is this from?  
9 A. (Witness reviews document.) It's another  
10 internal Philip Morris research report.  
11 MR. STEPHEN HERMAN:  
12 May we publish, Your Honor?  
13 THE COURT:  
14 No objection? You may publish it.  
15 MR. STEPHEN HERMAN:  
16 Carl, can you blow up the title to that,  
17 please?  
18 Okay. And can you blow up the actual  
19 title of I guess what the paper is in the  
20 middle where it says "Manipulation"?  
21 EXAMINATION BY MR. STEPHEN HERMAN:  
22 Q. And what's the date of this document, Dr.  
23 Farone?  
24 A. March of 1974. At about the time that I had  
25 just started working at Philip Morris.  
26 MR. STEPHEN HERMAN:  
27 Okay. If we could take those down for a  
28 second and look at the first column of the  
29 distribution list.  
30 Thank you.  
31 EXAMINATION BY MR. STEPHEN HERMAN:  
32 Q. What was Robert Seligman's position in 1976?  
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1 A. He had just become, if you remember the  
2 discussion from yesterday, he had just become the  
3 Vice-President of Research & Development. He had  
4 moved from New York to Richmond in that month.  
5 Q. And Thomas Osdene?  
6 A. Thomas Osdene was the Director of, at that  
7 time, it was called Research.  
8 Q. And R. Thomson?  
9 A. He's the Director of Administrative Services.  
10 Q. And W. Gannon?  
11 A. He was the Director of Product and Process  
12 Development.  
13 Q. R. Fagan?  
14 A. He was a staff assistant to the  
15 Vice-President of Research & Development.  
16 Q. F. Daylor?  
17 A. Frank Daylor was the flavor chemist. He  
18 reported to -- He and Mr. Meyer, the gentleman just  
19 above him, reported to Dr. Gannon.  
20 Q. And H. Wakeham?  
21 A. Dr. Wakeham was just leaving the Research &  
22 Development area as Vice-President to become a  
23 Senior Vice-President and received a copy of this.  
24 Q. Now, it's been suggested to the jury by  
25 defendants that a lot of people write down ideas  
26 from the boardroom all the way down to the mailroom.  
27 Do these people sort mail in the mailroom?  
28 A. No, they don't.  
29 Q. They were a lot closer to the boardroom than  
30 the mailroom; weren't they?  
31 A. Yes.  
32 Q. Did any of these people actually make  
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1 presentations to the Board?  
2 A. Yes, they did.  
3 Q. And in your seven or eight years at Philip  
4 Morris, did you ever receive a Philip Morris  
5 research memo like this from someone who worked down  
6 in the mailroom?  
7 A. No, I did not.  
8 MR. STEPHEN HERMAN:  
9 We can take that down.  
10 EXAMINATION BY MR. STEPHEN HERMAN:  
11 Q. Getting back to manipulation, how does the  
12 FTC regulate the amount of nicotine that a cigarette  
13 can give off?  
14 A. They do not.  
15 Q. The FTC doesn't require the companies to keep  
16 their tar or nicotine delivery at a certain level?  
17 A. They do not.  
18 Q. Philip Morris has the free choice to change  
19 its tar and nicotine deliveries at any time?  
20 A. That is correct.  
21 Q. Can you give the jury an example of Philip  
22 Morris changing the tar deliveries in a given brand?  
23 A. Oh, yes. There are many examples of being  
24 changed over years, both down and up. There's been  
25 several cigarettes for which the tar levels, based  
26 on the initial cigarettes, have been substantially  
27 increased over time.  
28 Q. Is that true for the other companies as well?  
29 A. For some of them, yes. I don't know that for  
30 every company that I've studied it. I have -- Well,  
31 I don't know that answer.  
32 Q. Okay. The FTC doesn't tell the company how  
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1 long to make the cigarette?  
2 A. That's correct.  
3 Q. The company is free to change the diameter?  
4 A. Yes.  
5 Q. The company is free to change the coatings?  
6 A. Yes.  
7 Q. The paper?  
8 A. Yes.  
9 Q. The ingredients?  
10 A. Yes, they are.  
11 Q. Does the FTC even know what ingredients the  
12 cigarette companies are using?  
13 A. No, they do not.  
14 Q. The FTC doesn't tell the companies whether to  
15 put something in a hard pack or in a soft pack?  
16 A. That is correct.  
17 Q. Whether to call the kind of cigarette low  
18 tar, high tar, ultra light or light?  
19 A. That is correct.  
20 Q. The industry is free to make these choices?  
21 A. That is correct.  
22 Q. Does the FTC prevent the cigarette companies  
23 from making safer cigarettes?  
24 A. They do not.  
25 Q. Does the FTC prevent the cigarette companies  
26 from advertising a cigarette as safer?  
27 A. They do not.  
28 Q. Are cigarette companies free to make a health

29 claim as long as it can prove a product is  
30 healthier; is that right?  
31 A. Specifically to the FTC, yes.  
32 Q. It's no different from any other restriction  
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1 on false advertising; is it?  
2 A. Well, it's a little different. It's a  
3 special order. But it essentially ends up being the  
4 same thing: If you can prove it, you can say it.  
5 Q. Okay. What knowledge or recollection do you  
6 have about the choices Philip Morris made with  
7 respect to studying the youth market?  
8 A. Well, I attended meetings, the Richmond  
9 meetings, where the youth market was discussed. And  
10 for a small period of time, one of the main persons  
11 that was asked to do those studies worked in one of  
12 the divisions that reported to me.  
13 Q. Now, the defendants have suggested -- Well,  
14 what was that person's name?  
15 A. Myron Johnston.  
16 Q. The defendants have suggested that Mr.  
17 Johnston's reports on youth smoking stayed in  
18 Richmond and were never provided to the marketing  
19 people or the other bigwigs up in New York.  
20 Do you have any knowledge about that?  
21 A. I do.  
22 Q. Can you shed some light on that?  
23 A. Mr. Johnston gave his reports at these  
24 Richmond meetings. And they were attended by all of  
25 the senior officials from New York from time to  
26 time. Certainly, the President of Philip Morris  
27 U.S.A., the Vice-President of Marketing attended  
28 virtually every meeting. And for Mr. Johnston's  
29 presentations, extra people from the marketing area  
30 would be brought to the meetings.  
31 Q. Did Mr. Johnston say anything about the  
32 importance of vending machines?  
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1 A. Yes.  
2 Q. Why was that important?  
3 A. The vending machines were important because  
4 that was the source for many of the -- in his  
5 opinion and in the data that he was looking at as  
6 reported to us -- was the source from which many  
7 underaged people purchased cigarettes.  
8 Q. Now, last week when Dr. Henningfield was  
9 here, the defendants put up a few definitions of the  
10 word "addiction." When the Congressman asked Mr.  
11 Campbell if nicotine was addictive, did you know  
12 what he meant?  
13 MR. LONG:  
14 Objection, Your Honor. Speculation and  
15 beyond the qualification of the witness.  
16 THE COURT:  
17 I presume the question is did this  
18 witness know what the Congressman meant --  
19 MR. STEPHEN HERMAN:  
20 Yes, Your Honor.  
21 THE COURT:

22 -- when he asked the question?  
23 The objection is overruled. Answer the  
24 question if you're able to.  
25 A. I believe I did, yes.  
26 EXAMINATION BY MR. STEPHEN HERMAN:  
27 Q. When you were at Philip Morris, did Philip  
28 Morris care whether nicotine was classified as  
29 addictive or habituating or dependence-producing?  
30 A. Well, they cared. Yes, they cared.  
31 Q. Why did they care?  
32 A. Well, because of the connotation of addiction  
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1 meaning that people didn't have choice to smoke the  
2 cigarette. Then once they started smoking it, they  
3 were dependent on the nicotine; and, therefore, that  
4 gave them a reason to continue to smoke, even if  
5 they knew that it wasn't good for them.  
6 Q. Okay. Well, were there also other factors  
7 that made Philip Morris concerned with how nicotine  
8 was classified?  
9 A. Yes.  
10 Q. What were some of those factors?  
11 A. Well, great concern -- that was one of the  
12 reasons that was mentioned to me during my hiring  
13 process, there was concern that the industry would  
14 be regulated because of the knowledge of nicotine as  
15 a drug.  
16 Q. Okay. Well, let's forget about regulation  
17 and just talk about smokers. With respect to  
18 smokers in Louisiana from 1976 to 1984, is it fair  
19 to say that Philip Morris wanted to keep smokers  
20 smoking?  
21 A. Yes.  
22 Q. And with respect to Louisiana smokers, Philip  
23 Morris didn't care whether you called it addictive,  
24 dependent, habituating or hooked; is that fair?  
25 A. That's fair.  
26 Q. And am I correct that Philip Morris designed  
27 cigarettes to take away at least some of the  
28 smokers' free choice?  
29 A. That is correct.  
30 Q. And in your expert opinion, based on  
31 everything you know, did Lorillard and Brown &  
32 Williamson and RJR design their products the same  
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1 way?  
2 MR. WITTMANN:  
3 Objection, Your Honor.  
4 MR. SCHNEIDER:  
5 Objection.  
6 MR. LONG:  
7 Objection.  
8 MR. WITTMANN:  
9 Lack of foundation.  
10 THE COURT:  
11 Overruled. Answer the question if  
12 you're able to.  
13 A. Yes, they did based on all the documents I've  
14 read.

15 EXAMINATION BY MR. STEPHEN HERMAN:  
16 Q. And, in your opinion, and based on everything  
17 you've observed, this conduct was intentional?  
18 MR. LONG:  
19 Objection, Your Honor.  
20 THE COURT:  
21 Sustained.  
22 EXAMINATION BY MR. STEPHEN HERMAN:  
23 Q. You know, Dr. Farone, we've looked at some  
24 documents and the jury has looked at a lot of  
25 documents over the course of this trial and you've  
26 mentioned that you've read a lot of documents and  
27 other documents while you were at Philip Morris; is  
28 that right?  
29 A. That is correct.  
30 Q. Are there documents that you, as Director of  
31 Applied Research at Philip Morris, were not privy  
32 to?

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1 A. Yes, there are.  
2 Q. How do you know that?  
3 A. Well, we had a system for generating certain  
4 kinds of information about testing of as-marketed  
5 products in Europe that did not allow me to see  
6 those documents.  
7 Q. All right. And did you ask to see those  
8 documents?  
9 A. Yes, on many, many occasions.  
10 Q. And are you familiar with the process by  
11 which these documents were generated and kept?  
12 A. Yes, I am.  
13 My boss, Dr. Seligman, and as part of the way  
14 things were done, we were informed as to what the  
15 procedures would be for developing, maintaining and  
16 finding out about these kinds of documents.  
17 Q. What are those procedures?  
18 A. Well, basically, anything to do with an  
19 as-marketed product biological test would be done by  
20 a person named Dr. Thomas S. Osdene. Anything that  
21 I needed to have done concerning those as-marketed  
22 products or if I had a request or suggestion would  
23 go to Dr. Osdene.

24 Osdene would then have cigarettes made in the  
25 what we call semiworks, a place where they can make  
26 cigarettes like they make cigarettes in the  
27 manufacturing center. Those cigarettes would be  
28 given codes.

29 They would then be sent to Europe, either to  
30 our laboratories in Europe, which the acronym was  
31 FTR, it was tobacco research labs of Philip Morris  
32 Europe located in Switzerland, or they would be sent

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1 to Cologne, Germany to a box. Either way, they  
2 would then be transmitted from those locations to a  
3 company called INBIFO, I-N-B-I-F-O, where the  
4 testing would be done.

5 The people at INBIFO would receive these  
6 products and test it. They would know the codes,  
7 they might not know the cigarettes. They would then

8 send that information back by the same route. There  
9 was a professor at the University of Geneva in  
10 Switzerland, Dr. Rylander, who was involved in that.  
11 They would then send that information to Dr. Osdene  
12 at his home.

13 Dr. Osdene would read that information, and  
14 then come and verbally give people who had requested  
15 that information, information about what he read.  
16 He did not bring the documents in. So he would tell  
17 us what had happened. And that was the mechanism  
18 that was used.

19 Q. That's a little hard to follow. Do you think  
20 it might be helpful to the jury if we put up a  
21 diagram?

22 A. Yes, I've made a diagram of it.

23 MR. STEPHEN HERMAN:

24 Can we show WF-48, please?

25 Can we publish, Your Honor?

26 THE COURT:

27 You may publish it.

28 EXAMINATION BY MR. STEPHEN HERMAN:

29 Q. What does this show?

30 A. Well, this is sort of a diagram. I'm  
31 attempting to explain what I just said because it is  
32 complicated.

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1 This is Philip Morris U.S.A. where Dr.  
2 Osdene, you can read this as being essentially Dr.  
3 Osdene. So Dr. Osdene is also down here  
4 (indicating). He's in two places.

5 So he requested that samples be made of  
6 cigarettes that were interested in testing. I  
7 mentioned a test that was done on changing the  
8 reconstituted tobacco in Marlboro, for example. So  
9 those cigarettes were made here under code, they  
10 were sent either to here or to here through a box in  
11 Cologne. This doesn't show everything. But most of  
12 them in the beginning were sent to our laboratories  
13 here. They would send the samples here  
14 (indicating).

15 The results of that would go back to Dr.  
16 Osdene's house where Dr. Osdene in this position  
17 would -- this arrow should go this way (indicating)  
18 -- he would communicate with Philip Morris  
19 Incorporated and tell us in the Research &  
20 Development Department what those results were.

21 Q. Now, the defendants, I think, pointed out  
22 that Philip Morris purchased INBIFO around 1971.  
23 When you were at Philip Morris, did you know that  
24 Philip Morris, Inc., I guess, owned INBIFO?

25 A. I did not.

26 MR. STEPHEN HERMAN:

27 We can take that down.

28 EXAMINATION BY MR. STEPHEN HERMAN:

29 Q. When Dr. DeNoble was here, he talked about  
30 some interaction between Philip Morris Research &  
31 Development and some attorneys. What, if any,  
32 information do you have about the relationship

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1 between outside attorneys and Philip Morris Research  
2 & Development?

3 A. Quite a bit since I was involved in several  
4 discussions with both outside and inside attorneys.

5 Q. Can you elaborate on that a little bit?

6 A. Well, in various parts of my research, I  
7 would get involved with issues that the attorneys  
8 had to have some input into.

9 For example, toward the latter part of my  
10 career, I would help convince attorneys that certain  
11 things should be published by changing manuscripts  
12 to comply with their request. So if there was  
13 something that was said in the manuscript that one  
14 of the scientists in the Research & Development  
15 Department wanted to say, that the lawyers said he  
16 couldn't say, I would try to help them change the  
17 wording to get past the attorneys.

18 In other instances, I was told of decisions  
19 that Philip Morris made based on discussions with  
20 attorneys and why the decisions were made to do  
21 things a certain way to -- by the attorneys of the  
22 company. And at least in one case, I was also privy  
23 to a decision made by an outside attorney regarding  
24 the Methoprene subject we discussed earlier. This  
25 is the pesticide that Philip Morris used on its own  
26 products internally.

27 Q. What did a lawyer have to do with that?

28 A. Well, when we were developing Methoprene to  
29 use for the tobacco beetle on our own products, it  
30 had not been approved by anybody for that use. And  
31 the question was if you use it on tobacco, you spray  
32 this product on tobacco, and it's not approved,  
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1 after I prove on these many pounds, thousands of  
2 pounds of tobacco, that it controlled the tobacco  
3 beetle, and it didn't grow in that tobacco, can I  
4 then put that tobacco into products which I can sell  
5 or do I have to destroy it and not put it into  
6 products you sell because the insecticide I'm using  
7 hasn't been approved by the Environmental Protection  
8 Agency?

9 Q. And?

10 A. And the decision -- I was in a conversation  
11 with Dr. Osdene. I happened to be in that  
12 conversation because, as I think I may have  
13 indicated, I had visited the company that made that  
14 material with Dr. Osdene when we were looking at  
15 diversification opportunities in California.

16 So because I was privy to the entire  
17 chemistry of that, I was allowed to sit in on the  
18 discussion of an outside attorney with Dr. Osdene,  
19 telling Dr. Osdene that it was perfectly okay  
20 because there was no regulation that covered things  
21 that you add to tobacco. So it was okay to sell  
22 commercially the tobacco in cigarettes that had been  
23 treated with this pesticide even though that  
24 pesticide had not yet been approved by the EPA.

25 Q. Do you know who the attorney was?

26 A. I do.

27 Q. Who was it?

28 MR. GAY:

29                   Objection, Your Honor. May we approach?  
30                   THE COURT:  
31                   Yes.  
32                   (Whereupon a bench conference is held at  
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1                   this time as follows:)  
2                   THE COURT:  
3                   Do you know what the answer is going to  
4                   be?  
5                   MR. STEPHEN HERMAN:  
6                   I think it's David Hardy.  
7                   THE COURT:  
8                   I'm sorry?  
9                   MR. STEPHEN HERMAN:  
10                  David Hardy, Jr. of Shook, Hardy or Fred  
11                  Newman of Shook, Hardy, one of those two.  
12                  MR. GAY:  
13                  Fred Newman never worked at Shook,  
14                  Hardy. I don't think -- What does this have  
15                  to do with -- This doesn't have any relevance  
16                  to this case, Judge. I don't know what it's  
17                  got to do with anything.  
18                  THE COURT:  
19                  We had this come up before and it's gone  
20                  to the jury: In some documents Shook, Hardy  
21                  tells us this, that and the other.  
22                  MR. GAY:  
23                  Right.  
24                  THE COURT:  
25                  That's already in. What's the  
26                  difference here?  
27                  MR. GAY:  
28                  Okay. But that's in a document. This  
29                  is a conversation, apparently, with some  
30                  counsel between people in the company.  
31                  THE COURT:  
32                  I understand.

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1                   MR. GAY:  
2                   It's got to have some privilege to it.  
3                   THE COURT:  
4                   The objection is overruled.  
5                   (Whereupon the bench conference is  
6                   concluded at this time.)  
7                   THE COURT:  
8                   Overruled. Answer the question if  
9                   you're able to.  
10                  A.       The attorney's name was David Hardy.  
11                  EXAMINATION BY MR. STEPHEN HERMAN:  
12                  Q.       I think you said that you were allowed to sit  
13                  in with Dr. Osdene. Was that unusual?  
14                  A.       Yes, it was.  
15                  Q.       What was the usual course of events?  
16                  A.       Well, usually if he had a telephone call from  
17                  the law firm that was outside, we would be asked to  
18                  leave the room so that he could have his discussions  
19                  in private.  
20                  Q.       Okay. Were there certain instances where  
21                  that happened?



22 A. Many instances.  
23 Q. Do you have any knowledge or information  
24 about Dr. DeNoble's lab being shut down?  
25 A. I do.  
26 Q. Can you tell the jury about that?  
27 A. We -- Actually, I was asked to attend a  
28 meeting on behalf of my superior, who at that time  
29 was Dr. Max Hausermann, to learn what the corporate  
30 reasons for shutting down his laboratory were.  
31 And I did attend the meeting and found out  
32 that the reason for shutting it down was to not have  
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1 any information relating to the addictive nature of  
2 nicotine within the research that we were doing.  
3 Q. Do you know what happened to the lab or the  
4 documents or anything else?  
5 A. Oh, yes. I mean, the lab was shut down in  
6 about a 24-hour period, the animals were killed, and  
7 the documents and everything were taken away.  
8 Q. Do you know whatever happened to them?  
9 A. No, I don't.

10 MR. STEPHEN HERMAN:  
11 Okay. Can we put up a demonstrative  
12 WF-49 for counsel, The Court and the witness?  
13 EXAMINATION BY MR. STEPHEN HERMAN:

14 Q. What is this, Dr. Farone?  
15 A. (Witness reviews document.) Well, I think  
16 this is the same thing we were talking about before.  
17 It's just a different organization of the lines.  
18 There's nothing new here.

19 MR. STEPHEN HERMAN:  
20 May we publish, Your Honor?  
21 MR. GAY:  
22 Objection. It's cumulative and  
23 repetitive.

24 THE COURT:  
25 Overruled. You may publish it.  
26 MR. STEPHEN HERMAN:  
27 Thank you, Your Honor.

28 EXAMINATION BY MR. STEPHEN HERMAN:  
29 Q. You mentioned something about a box?  
30 A. Yes.  
31 This is the second route that I talked about  
32 before where the samples go to the mail drop in  
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1 Cologne, Germany rather than samples going here. So  
2 they go to INBIFO. So this is just a second route  
3 that we had talked about before.  
4 Q. Do you know why that was established?  
5 A. Yes, I do.  
6 Q. Why?  
7 A. The people here at FTR felt they were being  
8 used administratively by Philip Morris U.S.A., by  
9 Dr. Osdene, and they didn't really like being used  
10 administratively. So they wanted the samples to go  
11 directly from here to here (indicating). Which the  
12 lawyer said, no, we're not going to do that. And so  
13 this box was established so that the people here  
14 didn't have to be postal workers for Dr. Osdene.

15 Q. Have you ever been to INBIFO?  
16 A. No, I have not.  
17 Q. So you don't know what documents at INBIFO  
18 may or may not have been preserved or destroyed?  
19 A. That is correct.  
20 Q. Are there some INBIFO documents that Philip  
21 Morris has now made available on their website?  
22 A. Yes, some 208,000.  
23 Q. What, if anything, do they tell us?  
24 A. Well, they tell us quite a bit about the  
25 different kinds of research that they were doing.  
26 Q. Is there anything they don't tell us?  
27 A. They don't tell us what the names of many of  
28 the products were that they were testing. They're  
29 only -- The documents, much of the test reports,  
30 only provide the codes of the products and not the  
31 names or the interpretation of what those products  
32 were.

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1 Q. When Dr. DeNoble was here, the defendants  
2 showed him some codes for nicotine analogs. Is that  
3 what you've been looking for?  
4 A. No, I'm looking for codes as you can find on  
5 some of the Philip Morris documents in Richmond  
6 which say these codes are Marlboro, these codes are  
7 Merit, these codes are Cambridge, so that you know  
8 what's being tested.

9 In the reports in the United States, you can  
10 find codes that say this is reconstituted leaf, this  
11 is various kinds of things. And, also, when they're  
12 tested for chemistry and tar and nicotine, they  
13 explain very carefully what codes are related to  
14 what products.

15 Q. In all your work since 1993 for the  
16 government, have you ever seen these codes?

17 A. I've only seen codes on two documents that  
18 were written in the 1960s, approximately 1964.

19 Q. Have you ever seen codes on any later  
20 products or documents?

21 A. No, I have not.

22 Well, I've seen codes but not an  
23 interpretation of codes that would enable me to say  
24 that the products being tested are as-marketed whole  
25 products.

26 Q. In all the cases that you've testified in, I  
27 think there were seven boxes of transcripts, have  
28 you ever been presented by Philip Morris or any  
29 other defendant with the code book?

30 A. No, I have not.

31 Q. Have you ever been able to find the code book  
32 on Philip Morris' website?

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1 A. Well, it would be over a period of time. I  
2 have not found any link that I could find that would  
3 name the products tested by INBIFO, with the  
4 exception of products that are like pure reference  
5 cigarettes or things like that. I have never found  
6 a code that corresponded to a commercial product.

7 Q. What happened to the code book that would

8 tell you what all of the codes in the INBIFO  
9 documents mean?  
10 A. I don't know.  
11 MR. STEPHEN HERMAN:  
12 We have no further questions, Your  
13 Honor.  
14 THE COURT:  
15 You may step down.  
16 Ladies and gentlemen, we are going to  
17 recess for today. And we'll resume at 9:30  
18 tomorrow morning. Be prompt as usual. Have  
19 a nice evening. See you tomorrow.  
20 (Whereupon the jury is excused at this  
21 time.)  
22 THE COURT:  
23 Let the record reflect that the jury has  
24 left the courtroom.  
25 Anything for the record by plaintiffs as  
26 a result of the afternoon's proceedings?  
27 MR. STEPHEN HERMAN:  
28 No, Your Honor.  
29 THE COURT:  
30 Defendants?  
31 MR. LONG:  
32 Two things, Your Honor.

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1 Number one, I renew my motion to strike  
2 Dr. Farone's testimony about the additives  
3 solely because Mr. Herman stated that they  
4 haven't finished examination in that area and  
5 they didn't go back in and link it up to any  
6 increased risk of addiction or disease.  
7 That's renewing the motion.  
8 And then, secondly, the senior Mr.  
9 Herman, Russ, had said earlier if we could  
10 agree to finish Dr. Farone's cross-  
11 examination tomorrow, he would waive  
12 redirect?  
13 MR. RUSS HERMAN:  
14 I said that, yes.  
15 MR. LONG:  
16 Okay. We will agree to that.  
17 MR. RUSS HERMAN:  
18 Okay.  
19 THE COURT:  
20 The renewed motion to strike is denied.  
21 9:30 tomorrow.  
22 MR. RUSS HERMAN:  
23 Your Honor, for the record, just so  
24 everybody has got advance notice, I know  
25 we're required on the Friday before. But  
26 since we're going to be on vacation, Dr.  
27 Benowitz will be our next witness on the  
28 Monday we return, on March 10th. There will  
29 be a live witness.  
30 I can't tell you right now who's going  
31 to follow Dr. Benowitz, but it will probably  
32 be Dr. Arnett. And that would take a lot of

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1 that week. And we will need at least a  
2 one-hour conference with Your Honor on two  
3 videotapes we need to play when we come back  
4 sometime that week.

5 THE COURT:

6 Fine. Thank you.

7 We will recess until tomorrow.

8 (Whereupon the proceedings were  
9 adjourned at 3:48 o'clock p.m.)

10 \* \* \* \* \*

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1 REPORTER'S CERTIFICATE  
2  
3  
4  
5

6 I, CHERYL FOURNET HUFFMAN, Registered Merit  
7 Reporter, in and for the State of Louisiana, as the  
8 officer before whom this testimony was taken, do  
9 hereby certify that this testimony was reported by  
10 me in the stenotype reporting method, was prepared  
11 and transcribed by me or under my personal direction  
12 and supervision, and is a true and correct  
13 transcript to the best of my ability and  
14 understanding; that I am not related to counsel or  
15 to the parties herein, nor am I otherwise interested  
16 in the outcome of this matter.  
17  
18  
19  
20  
21

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